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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-792

BERNARD G. RUBIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

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No. .....

BERNARD G. RUBIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Opinion Below.

The opinion of the Court of Appeals is reported at 559 F.2d 975 (5th Cir. 9/22/77). A copy of the opinion is attached in our Appendix (App. A). On November 2, 1977, the court denied petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc* (App. B). The court stayed the issuance of its mandate, pending the timely filing of a Petition for Writ of Certiorari (App. C).

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the impeachment of defense witnesses by eliciting and commenting upon their prior invocation of the privilege against self-incrimination before a federal grand jury is error of constitutional magnitude, or is simply a violation of evidentiary canons, subject only to the lesser harmless error standard of *Kotteakos v. United States,* 328 U.S. 750, 764-75 (1946), rather than the constitutional harmless error standard of *Chapman v. California,* 386 U.S. 18 (1967).

2. Whether the Indictment should have been dismissed for failure to record the grand jury proceedings, despite timely pre-indictment request.

Statement.

On October 22, 1975, after a two-week jury trial in the United States District Court for the Southern District of Florida (Honorable Peter T. Fay, presiding), petitioner was convicted on 103 counts of a 105 count Indictment charging embezzlement (29 U.S.C. §501(c); 18 U.S.C. §664), racketeering (18 U.S.C. §1962(c)), false statements on tax returns (26 U.S.C. §7206(1)) and failure to keep labor union records (29 U.S.C. §§436 and 439).

At the time of the alleged offenses,[1] petitioner was an official of the Laborer's International Union of North America ("LIU"). He was President of the Southeast Florida Laborer's District Council, President

[1]We do not expect the government to dispute our contention that on October 3, 1977, petitioner resigned all his union and trust fund positions and that in modification of his bond pending the resolution of this Petition consented to the imposition of proscriptions restraining him from exercise of control over any labor union or trust fund affairs or receipt of any monies or property from any union or trust fund.

of Local 666 of the Concrete Products and Material Yard Workers, Business Manager of LIU Local 478, and Special International Representative (R. 1-2).[2]

Counts 1 through 86 alleged separate instances of embezzlement from the labor organizations and trust funds. The gist of these offenses was that petitioner had engaged in multiple duplicate billings to the respective entity for expenses incurred. The government's theory was that petitioner embezzled the monies of the respective labor organizations or employee welfare benefit plan by causing the entity to pay for alleged item(s) of expenses knowing that the expense had been paid or would be paid by another labor organization (and/or employee welfare benefit plan).

Correlatively, Counts 97-99 alleged false subscribing of federal income tax returns for the calendar years 1972, 1973 and 1974, respectively (R. 127-129). The government's theory was that the excess reimbursement received from the multiple billings was not disclosed on petitioner's federal income tax returns.

Counts 87 and 88 alleged that during the approximate four year period covered by the Indictment, petitioner embezzled $178,701.00 and $150,330.00 from Local 666 and the District Council, respectively, by causing the respective labor organization "to pay him unauthorized salary increases." (R. 123).[3]

[2]"R" is a reference to the Clerk's Record. Reference solely to number will hereinafter be used as a reference to the Reporter's Transcript.

[3]The government's theory on these counts was that petitioner had engaged in criminal conduct by failing to follow the procedures prescribed by the local union and district council constitutions for raising salaries. Petitioner contended that his salaries were raised pursuant to these constitutions and that in any event, the responsible officers and delegates had properly

(This footnote is continued on next page)

Counts 89 through 96 alleged that appellant failed to keep adequate union records (R. 124-126).

Counts 100-105 alleged that appellant conducted the activities of the respective labor unions and trust funds through a pattern of racketeering activity in violation of 18 U.S.C. §1962 (R. 130-141).[4]

With respect to the "multiple" billing counts (Counts 1 through 86) petitioner did not challenge the government's contention that the various vouchers, airline tickets, charge card expenditures, etc., admitted into evidence by the government constituted requests for overlapping expenses.

On the "multiple billing" trust fund counts, the government introduced evidence that on the various trust funds each trustee would receive advances to attend educational conferences occurring one or two times per year (R.T. 287, 305-306, 402). In each instance, petitioner was voted the monies that he received (R. 298, 407).

The management trustees related that they had been advised by both the trust fund attorney and the trust administrator that if they did not spend the full allotted amount, they did not have to return the excess but should report any excess on their income tax returns (296, 300, 419, 582-583, 621-622).[5]

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delegated authority to him to set all salaries. On appeal, petitioner argued that the jury was erroneously instructed *inter alia* on civil fiduciary standards which effectuated strict liability in this criminal case. The court of appeals invoked the concurrent sentence doctrine to refuse to review petitioner's contentions (*Id.* at 990, f.n. 14, App. A).

[4]The "racketeering activity" alleged was the various acts of embezzlement charged in Counts 1 through 89 (R. 130-141).

[5]Petitioner was also informed by the trust fund's attorney that any excess could be spent for legitimate union purposes (1220, 1215).

The trusts' administrator, who served all the respective trust funds, issued the advances to petitioner with the knowledge that petitioner was receiving multiple advances (394-395).

In his defense, petitioner conceded the existence of his practice of multiple reimbursement. Petitioner detailed without contradiction that he would invariably cash the reimbursement checks; the proceeds would be received in cash and would not be deposited to any savings account, checking account or investment (1176-1179). Additionally, petitioner would cash most of his personal salary checks received from Local 478, which proceeds were used for his personal living expenses (1179).[6]

Petitioner explained that he spent the cash generated by the multiple reimbursements for union-oriented activities, primarily organizing expense.[7] As petitioner explained (1175-1176):

> Ever since late '68, '69 when our organizations reached financial strength, I accumulated this cash. I always accumulated a cash fund and was always spending cash.
>
> * * *

---

[6]Petitioner argued that this supported his defense that he used the monies obtained from multiple reimbursements for union-oriented purposes. He contended that if, indeed, he considered the proceeds from the union-expense money as his own, he would not have needed to cash the salary checks for his own personal expenses.

[7]Petitioner described examples: He would give cash to the organizers. If the union wanted to organize a subcontractor, in order to induce people into the union, the organizers would go into the shop and pick out one, two or three people they considered to be leaders in that subcontractor's organization and seek to enlist their help. These "independent contractors" would seek remuneration for their services in enlisting people to join the union. The organizer would pay $20-$30 for each person signed up (1171-1172).

I was on salary from two different organizations which is proper in the labor movement. I saw no impropriety with drawing expenses from each one of the organizations on which I was on salary. Each time I drew expenses from the organizations, each organization was getting a full measure of service.

I was representing each organization and drew reimbursed expenses. The excess of the reimbursed expenses was converted into cash and this cash was used to organize the unorganized.

To my belief, there was never a cent of cash received from these reimbursed expenses that was not spent for the benefit of the Union with which I am involved.

Petitioner described how cash was paid out during strikes because the striking employees could not receive unemployment benefits and had no other sources of income (1174).

Petitioner also testified that he paid large amounts of cash to entertain contractors (1182). Because he was dealing with executives of multi-million dollar corporations, he tried to deal with them on their own level (1189). Similarly, by cultivating friendships with other union officials and entertaining them, he could enlist their aid when it would be beneficial to the union (1183-1186).

With respect to the trust fund conferences, petitioner believed that they were one of the greatest encouragers of peaceful, harmonious labor-management relations. Whenever he received excess cash reimbursement, the cash went into his cash organization fund (1207-1211).

Petitioner believed that this provided the ultimate benefit to the member.[8]

Prior to the first conference attended by petitioner, the attorney for the trust funds advised him that it would be proper to receive advances from each fund and that if there were excess reimbursement, the money could properly be spent on legitimate union purposes (1220, 1215). Petitioner was aware that the attorney, and indeed the administrator, were also voted advances from each fund on which petitioner was a trustee (1227, 1229).

It was stipulated that petitioner disclosed all amounts he received from salary and reimbursed expenses from each labor organization on the LM-2 reports filed with the Department of Labor (1232-1233).

Several individuals corroborated petitioner's expenditure of cash for union-oriented purposes. We argue *infra* that the government committed constitutional error in cross-examining District Council organizers Kenton L. Wells and Jack Gordon. For purposes of cohesiveness, the summary of the testimony of those witnesses is found in a latter portion of this statement of fact (*infra* at pp. 11-13).

Larry Feder, an organizer for Local 666, estimated that since 1971, petitioner had provided him with $35,000 to $40,000 in cash for organizational expenditures (1582-1583). Feder described these expenditures which included large cash outlays during a three month

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[8]Petitioner described, for example, how a $4,000 cash expenditure for organizing at the Aventura Project, a high rise project in Miami, Florida, resulted in the acquisition of approximately 40 members. As a result, the trust fund would receive $104,000 per year in contributions in return for the $4,000 spent to acquire the new members (1213-1214).

strike at the Carriage House Hotel in Miami Beach (1564-1584). Feder also observed petitioner entertaining with cash and carrying large amounts of cash. When Feder questioned petitioner as to the wisdom of carrying around large amounts of money, petitioner told him that during the course of his daily routine, which included entertaining and organizing, it was necessary to have large amounts of cash (1571-1572).[9]

Several laborers corroborated significantly lesser expenditures of cash. One Lucius Smith not only observed petitioner spend cash on several occasions, but also personally received $2,400 which he then used to enlist others to help him in organizing (1628-1632). Jake Wright, a Local 478 business agent and District Council organizer, testified that in addition to the cash monies he had observed petitioner spend on many occasions, he had received $2,000 in cash to pay for organizing. He paid this cash to one Ulysses C. Edwards (1677-1680). Edwards corroborated Wright's testimony (1698-1700).

Jerry Schwartz, Executive Vice President of the County National Bank of North Miami, where petitioner maintained both personal and union accounts, recalled that he had often observed petitioner present checks for cashing. When Schwartz asked petitioner to deposit the checks rather than cash them, petitioner told him that he needed the cash (1654-1655). Schwartz also

[9]Feder testified that this conversation occurred at Capra's Restaurant in Miami and that petitioner paid cash for entertaining that evening (1572). Vincent Bruno, the owner of Capra's, called as a government witness, testified that on many occasions petitioner would come to the restaurant with union people and pay the bill with cash rather than charging it to the union (824-826). These bills would range from $70.00 to $150.00 (828).

recalled that in 1971 he was contemplating constructing a building project as a non-union project and when he spoke to petitioner, he was advised that petitioner's union was establishing a fund for organizing and would strike the project (1656).

Petitioner's expenditures of cash for entertaining was also corroborated by Joseph Fanti, a contractor, and Ralph DeMeo, a contractor and President of the Florida Home Builders Association. Each testified that during the many years they had known him, petitioner had entertained them on many occasions; each had seen petitioner expend cash for this purpose (1549-1557; 1706-1715).

On appeal, petitioner urged *inter alia* that the trial court committed constitutional and evidentiary error by allowing the prosecutor to elicit the prior invocation of the Fifth Amendment by two witnesses and that the prosecutor egregiously compounded the error by his closing argument.[10]

Two extremely important defense witnesses were union organizers Kenton Wells and Jack Gordon. The government's cross-examination and closing argument

[10]In addition to the arguments presented here, petitioner also argued that the conviction should be reversed because of (1) the exclusion of highly important evidence due to an incorrect view that the evidence constituted hearsay; (2) the deprivation of a fair trial by the improper use and subsequent jury instruction on codified federal civil law on fiduciary responsibility and exculpatory resolutions; (3) improper conviction of "racketeering" under 18 U.S.C. §1962; (4) the impropriety of the order of forfeiture of petitioner's union and trust fund positions; (5) the failure to allow an adversary hearing into allegations that the government's case was the product of illegal activity; and (6) the attendance of unauthorized persons before the grand jury. The court rejected the latter four contentions; the court determined to apply the concurrent sentence doctrine to foreclose consideration of the former two issues.

impugning the credibility of these two witnesses form the basis of our argument of error.

Wells, a District Council organizer and co-Mayor of the City of Opa-Locka, Florida, testified that as an organizer, he would attempt to solicit men to join the organization (1504).

With respect to the organizing of one specified construction project, petitioner provided him with at least $5,000 in cash (1509-1510). For other union purposes, petitioner had provided him with approximately $7,000 over the previous five years (1510-1513). Additionally, he observed petitioner spend large amounts of cash on entertaining for union purposes (1506, 1516-1517). Wells explained that in organizing a plant, it is necessary to pick out the key people to be influential in bringing other people into the membership. Sometimes it is necessary to compensate these people for their work (1513). Most often these people are paid by cash (1513-1514); it is also necessary to pay their bills while they are working (1514). Wells also explained that he paid cash provided by petitioner for work lists, addresses and telephone numbers (1514).

Jack Gordon, an organizer for Local 666 and the District Council, testified that over the past four years he had incurred entertainment expenses of approximately $150.00 per month at the Jockey Club and that petitioner gave him the required cash to pay these bills. Additionally, petitioner would reimburse him in cash for out-of-pocket expenses of approximately $1,500.00 per year (1616). Thus, over the past four

years petitioner had provided him with approximately $13,000.00 in cash (1617).[11]

Prior to the cross-examination of Wells, defense counsel approached the bench in an effort to avert the problem (1518-1519):

> Mr. Flax [defense counsel]: Your honor, we have another one of these anticipated problems.
>
> Rather than have the question asked, it is my understanding that Mr. Wells took the Fifth Amendment in the grand jury. Am I correct?
>
> Mr. Steinberg [Prosecutor]: That's correct.
>
> Mr. Flax: I want to inquire just how we are going to go into it. I think it is highly improper. I don't want to just stand up and object. I do want to try to head it off.
>
> Mr. Steinberg: I intend to go into it. I intend to ask him if he answered those questions in any different manner on the previous occasion.
>
> The Court: I will overrule the objection.

Thereafter, the prosecutor commenced his cross-examination of the witness by eliciting that Wells had invoked the Fifth Amendment before the federal grand jury.[12]

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[11]Gordon explained that the reimbursement for out-of-pocket expenses of approximately $1,500 per year was incurred for entertainment of contractors, meals, hotel rooms and football tickets.

[12]The relevant portions of the examination were as follows (1519-1524):

[1519]

Mr. Steinberg: Q. Mr. Wells, I notice that Mr. Flax asked you your occupation.

A. Yes, sir.

(This footnote is continued on next page)

Similarly, over objection, the prosecutor elicited from Jack Gordon that he had previously refused to testify (1622-1623).

The guise under which the prosecutor elicited the invocation of the Fifth Amendment by these witnesses was that the refusal to testify at the grand jury was

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Q. Have you ever given a different response on a previous occasion?
A. Not that I know of as far as my occupation. No I don't.

* * *

Q. Did you testify in the Federal Grand Jury on April 29, 1976, Sir?
A. This year?
Q. That's correct.
A. No, Sir, I didn't.
Q. You did not?
A. I came before the Federal Grand Jury.
Q. Were you asked this question:
"Q. What is your occupation?"
A. I was asked that question.

* * *

[1521]

Q. After you gave your address were you asked your occupation?
A. Yes.
Q. Did you give the same response that you gave Mr. Flax?
A. No, Sir. I took the Fifth Amendment.
Mr. Flax: May we approach the bench, Your Honor?
The following colloquy occurred at the bench (1521-1522):
Mr. Rosenfield: Your Honor, I would suggest that because the man answered the question before the grand jury that he refused to answer on the ground that it might tend to incriminate him, this would be improper and highly prejudicial. There is nothing inconsistent about a witness trying to invoke the Fifth Amendment in front of a grand jury and testifying here. There is nothing inconsistent about that at all. This kind of questioning is improper.

* * *

The Court: I have overruled your objection. You can certainly bring out that he refused to testify before the grand jury. I think that is proper cross-examination.

With the Court's express sanction, the prosecutor then continued to elicit that Wells had never told the government about the cash received from petitioner (1523-1524).

inconsistent with testifying as a defense witness at trial. Then, in closing argument the prosecutor argued (1911):

> Jack Gordon, Mr. Jack Gordon—you saw him sitting up there. He is another one of the fat cats. He is living off the sweat of these laborers. You heard now much money he was getting, and when he was given an opportunity to testify at the grand jury, what did he do? He refused to testify about the same matters. Why?
>
> If his testimony would have exculpated Mr. Rubin, it would have meant that we would not be here today. Why would he not have offered it? Why would he not have told us?
>
> He never told the government about any cash pool. He had an opportunity and he submitted bills for organizing.

Addressing himself to Kenton Wells, the prosecutor argued to the jury (1914):

> Now, Mr. Kenton Wells,
>
> * * *
>
> What did he do when he got to the grand jury and was given an opportunity to testify about Mr. Rubin? If he had something to exculpate Mr. Rubin, to say Mr. Rubin was a good guy, he did the right thing, he followed the law, why did he not say it? Why did he not say it? Why is he a willing witness now and not a willing witness then?

Defense Counsel moved for a mistrial based on the improper comment on the exercise of the Fifth Amendment by these witnesses (1959). The motion was denied (*ibid.*).

In rebuttal argument the prosecutor reiterated his same theme (2043-2044).[13]

> Now, Mr. Rosenfield also said that they had witnesses come in here and tell us about this money and where it went and you cannot disbelieve them. I would argue with that. This is what a jury is for, and that is what the Judge will tell you a jury is for. You are here to judge the credibility of these witnesses. You use your common sense. You use every test you use to test the credibility of your friends, your neighbors, people you do business with, your insurance people. Use your common sense.
>
> If you ask a man something last year about something that happened before that and he refuses to tell you, he refuses to tell you about that, why is it changed a year later when he is here a year later testifying for Mr. Rubin on the witness stand and all of a sudden he is a volunteer? Why does it change?
>
> You ask yourself, if you ask a man a question a year ago and he says, "X," and then he comes here to this witness stand under oath and says, "Y," you judge for yourself. You are the judge of the credibility of these witnesses. You do not have to accept what the Government witnesses say at face value. You do not have to accept what the defense witnesses say at face value. You are the sole judges of the credibility of these witnesses. I cannot tell you whether they lied or not. That is not my decision. Mr. Rosenfield

[13]The defense, however, did not in any manner address itself in closing argument to the prior invocation of the Fifth Amendment by the witnesses.

> cannot tell you that. That is your decision. You use the facts you have at hand to determine whether they were credible and if they have a motive, if they have a motive for testifying.

On appeal, the Fifth Circuit validated petitioner's claim that the impeachment of these witnesses was error. The court considered that argument to be a "most troubling challenge to the validity of the conviction . . ." (559 F.2d at 979, App. A). Drawing upon the teachings of this Court in *Grunewald v. United States,* 353 U.S. 391 (1975); *United States v. Hale,* 422 U.S. 171 (1975) and *Doyle v. Ohio,* 426 U.S. 610 (1976), the court concluded that the district court had "violated evidentiary canons by permitting such impeachment." (559 F.2d at 979, App. A). The court specifically held (*Id.* at 983, App. A):

> A defense witness's prior refusal to supply testimony to a grand jury before which he had a reasonable belief that he might be a defendant himself has no proper significance as impeachment evidence. Use of the evidence for that purpose risks prejudice. Accordingly, we hold that the government may not attempt to impeach a defense witness by eliciting such a prior refusal to testify before a grand jury [Footnote omitted.]

Aligning itself with the Eighth Circuit decision in *United States v. Williams,* 464 F.2d 927 (8th Cir. 1972) and the Second Circuit decisions in *United States v. Glasser,* 443 F.2d 994 (2d Cir. 1971); *United States v. Tomaiolo,* 249 F.2d 683 (2d Cir. 1957) and *United States v. Natale,* 526 F.2d 1160 (2d Cir. 1975), the court nevertheless adopted a perspective

not voiced by those other Circuits—by concluding that the error was not of a constitutional nature, thus allowing the harmfulness to be assessed under the lesser standard of *Kotteakos v. United States*, 328 U.S. 750, 764-765 (1946) rather than the stricter standards applied to constitutional error. *Chapman v. California*, 386 U.S. 18 (1967).[14]

In weighing the purported harmfulness of the impeachment, the court apparently carefully avoided opining upon the result it would reach if it were determined that the constitutional harmless error standard was applicable. In applying the less stringent *Kotteakos* standard, the court concluded that on balance the error was probably not sufficiently harmful to require reversal. We argue *infra* that the court applied an erroneous standard in assessing the error's potential harmfulness and should have applied the standard applicable to constitutional violations. Moreover, we urge that irrespective of the applicable standard, the prejudicial impact of the prosecutor's actions require the granting of the Petition for Writ of Certiorari and reversal of the Court of Appeals' decision.

[14]No other circuit has drawn such a distinction. In *United States v. Williams, supra,* the Court rejected the government's contention of harmless error without discussion as to the standard employed by the court. Similarly, neither *Glasser, Tomaiolo* nor *Natale* focused on this aspect.

ARGUMENT.

I

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE PROSECUTOR'S MISUSE OF THE PRIOR INVOCATION OF THE FIFTH AMENDMENT BEFORE THE GRAND JURY BY IMPORTANT DEFENSE WITNESSES WAS NOT ERROR OF CONSTITUTIONAL DIMENSION.

A. The Court Below Correctly Concluded That the Cross-Examination and Comment Upon the Prior Exercise of the Fifth Amendment Was Error.

As a preliminary matter, we present a brief analysis of the nature of the error which occurred below. We then turn to a consideration of the proper standard to be employed in assessing the prejudicial impact.

The error which was permitted by the district court was not the result of an inadvertent or isolated act of the federal prosecutor. The defense attempted to avert the error; indeed, the defense asserted the proper legal objections prior to the interjection of the impermissible evidence. The prosecutor, with the express sanction of the court, made a considered judgment not only to elicit the prior invocation of the Fifth Amendment by these witnesses, but also to vigorously argue to the jury the precise inference which the law wisely condemns. Moreover, the prosecutor's own determination of the importance of destroying the credibility of these particular witnesses is reflected in his statement to the jury concerning witness Gordon (1911):

> If his testimony would have exculpated Mr. Rubin, *it would have meant that we would not be here today*. Why would he not have offered it? Why would he not have told us? [Emphasis added.]

In our view, the prosecutor's vociferous reliance on these witnesses' prior invocation of the Fifth Amendment in order to destroy their credibility totally deprived petitioner of a fair trial.

Proper analysis requires the initial recognition that the government did not at any time purport to claim in the courts below that either witness improperly asserted his personal privilege against self-incrimination when he appeared as a witness before the grand jury. There is no suggestion in this record—nor could there be—that *at the time the witnesses appeared before the grand jury that their respective assertions of privilege were anything but proper and for their own personal protection.*[15] It is an elementary principle of our jurisprudence that the privilege is purely personal; it cannot legitimately be asserted to protect or shield others from inquiry into their affairs. The notion that the "public has a right to everyone's evidence," *Kastigar v. United States,* 406 U.S. 441, 443 (1972), is firmly imbedded.

When the government's interest in acquiring testimony conflicts with the witness's privilege against self-incrimination, the government is entitled to obtain immunity for the witness, thus removing the witness's fear of self-incrimination and securing the witness's testimony. See 18 U.S.C. §§6002, 6003.

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[15]The court of appeals reached the same conclusion in observing (559 F.2d at 982, App. A):

> "Insofar as the record reveals, the two witnesses also could have been justified in the conclusion that they were being interrogated for the express purpose of supplying evidence against themselves. They, of course, could invoke the privilege properly only to avoid incriminating themselves: the government has never levied the charge that either improperly claimed the protection of the fifth amendment."

Even if the government does not desire to grant immunity, nevertheless where persons improperly invoke the Fifth Amendment for protection of others, the government is still not without remedy. Since the privilege does not exist to protect others, but exists only where there is a " 'real and appreciable' and not merely 'imaginary and unsubstantial' hazard of self-incrimination," *Marchetti v. United States,* 390 U.S. 39, 48 (1968), the government has the power to seek contempt sanctions for those who improperly assert the testimonial privilege. Although the privilege "guarantees the right to remain silent absent immunity," *Garner v. United States,* 424 U.S. 648, 96 S.Ct. 1178, 1182 (1976), nevertheless:

> [u]nless the government seeks testimony that will subject its maker to criminal liability, the constitutional right to remain silent absent immunity does not arise. An individual therefore properly may be compelled to give testimony, for example, in a noncriminal investigation of himself. See *e.g. Gardner v. Broderick,* 392 U.S. 273, 278 (1968).

Garner, supra. The Fifth Amendment cannot be used to shield third persons. *Couch v. United States,* 409 U.S. 322, 328 (1973); *Hale v. Henkel,* 201 U.S. 43 (1906). A prospective grand jury witness, who is unsure of the depth and scope of the grand jury investigation, has the constitutional prerogative of protecting himself by assertion of the privilege. "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances," *Slochower v. Board of Higher Education,* 350 U.S. 551, 557-558 (1956).

When these witnesses appeared before the grand jury and invoked the Fifth Amendment, if the invoca-

tion of the privilege was improperly oriented to shield petitioner rather than for personal protection, the government had the power to compel the testimony—by attempting to invoke the contempt sanction. As the *Garner* court stated (424 U.S. 628, 96 S.Ct. 1178, n.11):

> As we have noted, the privilege is an exception to the general principle that the Government has the right to everyone's testimony. A corollary to that principle is that the claim of privilege ordinarily must be presented to a "tribunal" for evaluation at the time disclosures are initially sought. This early evaluation of claims allows the Government to compel evidence if the claim is invalid or if immunity is granted and therefore assumes that the government obtains all the information to which it is entitled.

There was simply no suggestion made to the trial court that at the time these witnesses invoked their Fifth Amendment privileges that there was anything improper about their respective assertions of privilege. If the government believed otherwise, the remedy was to seek the court's aid to compel answers to specific questions. See *Hoffman v. United States,* 341 U.S. 479, 71 S.Ct. 814 (1951); Cf. *In re Investigation Before April 1975 Grand Jury,* 403 F.Supp. 1176 (D.C. Cir. 1975), vacated 500 F.2d 600 (D.C. Cir. 1976).[16]

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[16]In *In re Investigation,* 19 witnesses acting on the advice of an attorney with potentially conflicting interests invoked the Fifth Amendment to even innocuous questions, and the district court disqualified the attorney, requiring separate representation. The Court of Appeals vacated the disqualification order and instructed the government to cure any suggestion of impropriety by challenging any unwarranted claims of privilege.

One of the essential vices of the error committed by the government was its total failure to offer any evidence that there was anything improper about the witnesses' assertion of their privilege. Yet, the only way in which the argument that the government made would acquire any probative force whatsoever, would be if the invocation of the privilege at the grand jury stage by the witnesses was injustifiable. "[T]o be admissible, keeping silence must be much more than ambiguous." *United States v. Fairchild,* 505 F.2d 1378, 1383 (5th Cir. 1975). Moreover, in closing argument, the prosecutor truly perverted justice when he invited the jury to join him in speculation as to why the witnesses would have invoked the Fifth Amendment before the grand jury, then later testify at petitioner's trial. The prosecutor asked the jury to infer that they acted to shield petitioner at the grand jury stage. The record, of course, was totally devoid of any such evidence, and indeed every permissible inference is to the contrary.

In *Grunewald v. United States,* 353 U.S. 391 (1957), reaching the conclusion that the invocation of the privilege lacked probative value as impeachment of trial testimony, the Court "emphasized anew that one of the basic functions of the privilege is to protect *innocent* men." (Emphasis in original) 353 U.S. at 421, and that (*id.* at 422):

> [T]he Fifth Amendment claim was made before a grand jury where the witness was a compelled and not a voluntary witness; where he was not represented by counsel; where he could summon no witnesses; and where he had no opportunity to cross-examine witnesses testifying against him. These factors are crucial in weighing whether a

plea of the privilege is inconsistent with later exculpatory testimony on the same questions, for the nature of the tribunal which subjects the witness to questioning bears heavily on what inferences can be drawn from a plea of the Fifth Amendment. [citation omitted]. Innocent men are more likely to plead the privilege in secret proceedings where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedure provide safeguards for the establishing of the whole as against the possibility of merely partial truth.

The *Grunewald* majority rested the decision on evidentiary grounds. Nevertheless, four members of the Court would have rested the decision squarely on constitutional grounds (353 U.S. at 425-426).

Then, in *United States v. Hale,* 422 U.S. 171 (1975), the Court rejected the government's contention that it could permissibly cross-examine a defendant by eliciting his prior silence at the time of arrest. Resolving the issue on evidentiary grounds, the Court concluded that "[i]f the Government fails to establish a threshold inconsistency between silence . . . and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded." (*Id.,* at 176).

Finally, only last term, in *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240 (1976), the Court reached the issue left open by *Hale* and concluded that it was error of constitutional magnitude to allow a state prosecutor to impeach a testifying defendant by inquiry as to the defendant's post-arrest silence. The Court

recognized that silence in the wake of *Miranda* warnings (*Miranda v. Arizona,* 384 U.S. 436 (1966)) is "insolubly ambiguous" (96 S.Ct. at 2244).

The court below properly rejected the government's argument that the prosecutor's cross-examination and closing argument were permissible. Relying upon this Court's teachings as well as the decisions of the Second and Eighth Circuits, the court recognized the invalidity of the government's reasoning (559 F.2d at 983):

> The conclusion . . . that a defense witness's prior silence before a grand jury and trial testimony exculpating the defendant lack sufficient inconsistency to justify impeachment use of the silence is well-founded. *Grunewald* teaches that the many factors that may lead an individual to remain silent before the grand jury make it impossible to draw any reasonable inference that a subsequent protestation of his own innocence has been fabricated. Assuming a reasonable belief at the time of the witness's grand jury appearance that he himself may be a defendant, any suggestion of inconsistency between his silence and subsequent testimony exculpatory of someone else can certainly be no stronger.

In our view, it was no less "fundamentally unfair" to allow the prosecutor here to benefit from the prior invocation of the privilege by these witnesses than in *Doyle* where this Court recognized the fundamental unfairness attendant to the inquiry into silence following *Miranda* warnings.

There is simply no justification for allowing the inquiry and argument sanctioned by the trial court. This entire area of inquiry and argument was patent

error striking right to the very essence of petitioner's defense at this jury trial. The court in no way interfered with this approach by the government despite fervent objection. Moreover, no cautionary instruction was given, nor could one have cured the egregious error. We turn, then, to a consideration of the standards to be applied in assessing the harmfulness of the error which occurred.

B. The Court Applied an Erroneous Standard by Concluding That the Error Was Merely Evidentiary and Did Not Rise to Constitutional Proportion.

The court of appeals committed serious error in concluding that a prosecutor may elicit a prior invocation of the Fifth Amendment before a grand jury by important defense witnesses, and thereafter comment upon the exercise of that privilege as indicative of the defendant's guilt without running afoul of any constitutional protection.

The reasoning that constitutional values were not involved allowed the court to escape the application of the harmless error standard enunciated by this Court in *Chapman v. California*, 386 U.S. 18 (1967), which would have required the court to conclude that the error was harmless "beyond a reasonable doubt." Instead, the court below applied the less stringent standard of *Kotteakos v. United States*, 328 U.S. 750 (1946) in attempting to calculate the harmlessness of the error.

This case thus presents to this Court an issue of critical importance. If, as the court below contends, there is no constitutional bar to the impeachment use of protected silence, then there is no bar to the unchecked proliferation in the state courts of such im-

peachment tactics. As this Court noted in *Burgett v. Texas*, 389 U.S. 109, 113-114 (1967):

> The states are free to provide such procedures as they choose, including rules of evidence, provided that none of them infringes a guarantee in the federal Constitution.

See also, *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 149 (1970).

The danger to the exercise of the privilege against self-incrimination, if the decision of the court below is permitted to stand, is best illustrated by the recent decision in *Doyle v. Ohio, supra*, in which this Court concluded that the use of a defendant's post-arrest silence to impeach was indeed a constitutional violation and not merely a breach of evidentiary rules; this constitutional holding was finally necessitated by the failure of state courts consistently to exclude such evidence based on evidentiary canons. The *Doyle* court specifically reserved the question of whether constitutional error would obtain upon the use of post-arrest, post-*Miranda* warning silence to impeach a defense witness rather than the defendant (426 U.S. at 6).

The acceptance of the expedient rule adopted below will thus put this Court's *sub silentio* imprimatur on a practice which would allow state prosecutors to call all potential defense witnesses before a grand jury, advise them that they are targets of an investigation, thus obtaining an invocation of the privilege against self-incrimination and thereafter proceed, secure in the realization that if those persons appear as defense witnesses, the prosecutor may permissibly seriously impugn their credibility by eliciting and commenting upon their prior invocation of the privilege. *Cf. Glasser v. United*

States, supra. Moreover, federal prosecutors will be secure in the knowledge that they too may engage in the condemned practice and will not be reversed upon appeal unless the defense successfully persuades the appellate court that the error affected the verdict under reviewing standards less strict than the applicable standard for constitutional violations.

In our view, the error of such a practice rises to constitutional dimensions and is equally repugnant to constitutional values irrespective of whether the forum is state or federal. Because of the exceptional importance of this issue—and the wide-ranging impact which its resolution will have on the conduct of both state and federal trials within the Nation—this case presents a paradigmatic one for granting the Petition for Writ of Certiorari.

The decision below reflects an ill-advised determination that requires remedial action by this Court. The potential for abuse of the rule adopted below is manifest. The court ignored this potential in observing (559 F.2d at 984, n.7):

> Beyond the unfairness of exploiting a claim of the privilege, we cannot conclude that the grand jury silence of a defense witness is so utterly lacking in probative value yet highly charged with prejudicial potential that its use merits universal constitutional condemnation.

Adherence to notions of fundamental fairness strongly suggests that this is not a proper area to allow disparate rules throughout the states. Uniform condemnation of the practice is constitutionally required.

The error committed below was of far greater import than a simple violation of evidentiary canons. The

tactic used by the prosecutor in the instant case is inextricably intertwined with the right to a fair trial and right to the unhampered production of witnesses in one's defense that is at the very core of the Fifth and Sixth Amendment guarantees. This Court recently reaffirmed this primal constitutional value in *United States v. Nixon,* 418 U.S. 683, 711 (1974):

> The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted by the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the court to vindicate those guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced.

Indeed, so important is the petitioner's constitutional right to freely call witnesses so that live testimony may be presented on his behalf, that the Court has stated:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense.

Chambers v. Mississippi, 410 U.S. 284 (1973), citing *Webb v. Texas,* 409 U.S. 95, 98 (1972); *Washington v. Texas,* 388 U.S. 14, 19 (1967); *In re Oliver,* 333 U.S. 257 (1948).[17]

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[17]As explained by the Court in *Washington v. Texas* (388 U.S. at 19):

(This footnote is continued on next page)

If a witness's rights can be trampled upon with impunity, as they were here, the ability of a defendant to obtain witnesses on his behalf will be necessarily and seriously impaired, particularly in a case such as this where the witnesses' testimony is important to the defendant and where the witnesses have the option to testify or to continue to assert their Fifth Amendment right to remain silent. In such situations, the power to subpoena witnesses is not sufficient to ensure the defendant's ability to present his case. A defendant is utterly dependent upon the witnesses' *co-operation* in agreeing to testify. Thus, it has been consistently held that the government may not impair, directly or indirectly, the willingness of potential witnesses to freely testify on behalf of the defense. See *United States v. Thomas,* 488 F.2d 334, 336 (6th Cir. 1973) (government agent's threat of prosecution "interfered with any free and unhampered determination the witness might have made as to whether to testify and if so, as to the content of such testimony" and thus required a new trial); *United States v. Morrison,* 535 F.2d 223, 228 (3rd Cir. 1976) (prosecutor's intimidation in an unnecessary interview "interfered with the voluntariness of the [witnesses'] choice [whether or not to testify] and infringed defendant's constitutional right to have [witnesses'] freely given testimony"); *Bray v. Paton,* 429 F.2d 500, 501 (4th Cir. 1970) (state's

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The right to offer the testimony of witnesses and to compel their attendance if necessary is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish the defense. This right is a fundamental element of due process of law.

arrest and intimidation of defense witness requires a new trial); *United States v. Smith,* 478 F.2d 976 (D.C. Cir. 1973) (prosecutor violated Fifth Amendment by warning witness that he might be incriminating himself; such warning is calculated to intimidate witness from testifying).

Plainly, witnesses who are aware that their invocation of the Fifth Amendment before the grand jury will be publicly revealed and used to discredit them will be reluctant or unwilling to voluntarily take the witness stand: why should such witnesses stand and expose themselves to the public ignominy and threat to their own livelihood which revelation of their conduct before the grand jury would surely entail? For these reasons, the court below seriously erred in analyzing the constitutional problems solely in terms of the witnesses' right to remain silent. Violation of the witnesses' rights to claim the privilege in secrecy here leads inevitably to a violation of the petitioner's own constitutional right—his right to call witnesses on his own behalf who are not discouraged from testifying by fear of government action which may cause them to be publicly discredited and professionally disgraced.

The federal courts cannot shirk from the constitutional condemnation of a practice which so invidiously infringes upon a basic right.

The Court Erred in Denying Standing to Petitioner Who Is Asserting His Own Constitutional Right as Well as Those of His Witnesses.

In order to fully protect constitutional rights, the petitioner must be allowed to assert his witnesses' rights under the circumstances of this case. We commence with the proposition that the impeached witnesses suf-

fered infringement of their constitutional rights. Use of a witness's prior claim of his Fifth Amendment privilege against self-incrimination to discredit his subsequent testimony is surely an error with "grave constitutional overtones." *Grunewald v. United States,* 353 U.S. 391, 423 (1957) (invalidating such practice on non-constitutional grounds); indeed, as Justice Black stated, concurring in an opinion in which four Justices joined:

> "I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if the person can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution, to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution." 353 U.S. at 426.

While the panel below did not directly deal with the constitutional violation suffered by the witnesses here, it is noted that use of the witnesses' constitutionally protected prior silence would also violate the constitutional principle enunciated in *Doyle v. Ohio, supra,* —that it would be "fundamentally unfair and a deprivation of due process" to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial, 426 U.S. at 618. The court concluded (559 F.2d at 984; App. A):

> "That same unfairness may be present whenever the government attempts to exploit a proper invocation of the privilege. The factors found intolerable in *Doyle* might be thought to extend to the witnesses' silence in the face of grand jury questioning."

That the "factors found intolerable in *Doyle*" do indeed extend to a witness's silence before the grand jury, is clear from a review of the principles and precedents governing Fifth Amendment analysis.

Witnesses testifying before a grand jury are not only entitled but are *encouraged* to rely on the secrecy of those proceedings. See, *e.g., Branzburg v. Hayes,* 408 U.S. 665 (1972). Plainly, the witnesses here, Wells and Gordon, were entitled to the reasonable expectation that their invocation of the Fifth Amendment before the grand jury would remain secret —indeed, that it could not be made public even if they, themselves, were indicted and took the stand in defense. *Grunewald v. United States,* 353 U.S. 391 (1957). Had these witnesses, at the time of their grand jury appearances, been forewarned that their exercise of the right to remain silent would be used against them—not for any compelling governmental purpose, nor for any probative evidentiary value,[18] but merely for the purpose of impugning their credibility and damaging their reputations—surely, their right to assert the privilege would have been rendered "costly." See *Spevack v. Klein,* 385 U.S. 511, 515 (1967).

This Court has repeatedly held that the state may not unnecessarily exact a price for assertion of the "grand privilege,"[19]; the prohibited costs have never

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[18]The Panel below explicitly found the disclosure of the witnesses' silence has "no proper significance as impeachment evidence." (559 F.2d at 983).

[19]See, *e.g., Malloy v. Hogan,* 378 U.S. 1 (1964); *Griffin v. State of California,* 380 U.S. 609 (1965).

been restricted to criminal sanctions. In *Spevack v. Klein*, 385 U.S. at 515, the Court noted that:

> In [the Fifth Amendment] context, "penalty" is not restricted to fine or imprisonment. It means as said in *Griffin v. State of California*, 380 U.S. 609 . . . the imposition of any sanctions which makes assertion of the Fifth Amendment privilege "costly."

Within the context of that case, the Court held that:

> The threat of disbarment and the loss of professional standing, professional reputation and of livelihood, are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him." (*id.*). [Emphasis added].[20]

Nor is the threat of discharge the only "cost" which can unduly burden the exercise of the Fifth Amendment privilege. In *Lefkowitz v. Turley*, 414 U.S. 70 (1973), the sanction of disqualification from state contracts was held impermissible. In *McCarthy v. Arndstein*, 266 U.S. 34 (1924), the state's valid interest in marshalling and distributing the assets of bankrupts was held not to prevail over the protection of the privilege.

The constitutional justification for refusing to permit the government to unnecessarily make "costly" the ex-

[20]See also *Slochower v. Board of Education*, 350 U.S. 551 (1956); *Garrity v. State of New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); and *Uniform Sanitation Men v. New York*, 392 U.S. 280 (1968) (state may not burden the Fifth Amendment right by threat of loss of employment).

ercise of the Fifth Amendment right, has been framed in a variety of terms. *Doyle v. Ohio, supra,* found it "fundamentally" unfair and a "deprivation of due process" to extend with one hand the privilege of silence, while placing, with the other hand, a price upon that silence (*id.* at 618). *Miranda v. Arizona*, 384 U.S. 436 (1966) indicated that the Fifth Amendment demarcated the "right to a private enclave where [one] may lead a private life" (*id.* at 460) (quoting *United States v. Grunewald*, 233 F.2d 556, 581 (Frank, J. dissenting, reversed 353 U.S. 391 (1957)).[21]

Whatever terms are used, however, it is clear that threats that the government will publicly advertise a witness's invocation of the Fifth Amendment privilege—and thus damage his credibility and reputation—works a compulsion against and exacts a heavy penalty for the assertion of that privilege. In the words of *Doyle*, it is "fundamentally unfair" to assure witnesses before the grand jury that they may avail themselves of the Fifth Amendment protection in secret and then to gratuitously publicize that assertion at an open trial. In the language of *Miranda* and *Griswold*, these witnesses had a justifiable and constitutionally protected expectation that the government would refrain from needlessly invading the domain of privacy which they demarcated before the grand jury.

Indeed, just as occurred in *Spevack, supra,* Wells and Gordon have been forced to suffer "loss of professional standing [and] professional reputation" and they

[21]See also *Boyd v. United States, supra,* 116 U.S. at 630; *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964); *Griswold v. Connecticut*, 381 U.S. 479 (1965) noted that "The Fifth Amendment in its self-incrimination clause enables the citizen to create his own privacy which government may not force him to surrender to his detriment." (*id.* at 484).

face the very real possibility that their jobs as union officials will be endangered.[22]

No justification for imposing this burden on the exercise of constitutional rights exists; indeed, the penalty was here exacted in a procedure which the court below found impermissible even from an evidentiary viewpoint.

The Petitioner Has Standing to Raise the Witness's Constitutional Rights in This Case.

Here, despite the plain infringement upon the witnesses' constitutional rights, the court of appeals held that no constitutional issue could be raised in this case. The court justified this conclusion by reference to the general and oft-repeated "rule" that one person may not object to the violation of another person's rights. This "rule" however, is one which as many commentators have noted, is riddled with exceptions. See, Note, "Standing To Assert Constitutional Jus Tertii," 88 Harvard Law Review 423, 425 (1968); Settler, "Standing to Assert Constitutional Jus Tertii In the Supreme Court," 71 Yale Law Journal 599 (1962); Scott, "Standing in the Supreme Court—A Functional Analysis," 86 Harvard Law Review 645 (1973) and Louis, "Constitutional Rights and the Misuse of Standing," 14 Stanford Law Review 433 (1962).

Indeed, the principle that one has no standing to vindicate another's constitutional right is "only a rule

[22]Although it appears that this Court itself has never resolved this issue, lower courts have held that there is no constitutional right to employment and private employers may therefore discharge employees for exercising Fifth Amendment rights. See, *e.g., Cary v. Westinghouse Electric Corporation,* 178 N.Y. 2d 846, affirmed, 190 N.Y. 2d 1103 (1958).

of practice." *Barrows v. Jackson,* 346 U.S. 249, 257 (1953) which "like any general rule should not be applied when its underlying justifications are absent." *Singleton v. Wolf,* 428 U.S. 106, 114 (1976).

In *Singleton,* the court reviewed the factors which justify or may even make imperative the court's permitting a litigant to raise another's rights. First, there must be a concrete injury to the litigant sufficient to create a "Case or Controversy" within the meaning of Article III. Second, the court must analyze whether "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue" so that the court "can be sure that construction of the right is not unnecessary in the sense that the rights enjoyment will be unaffected by the outcome of the suit." 428 U.S. at 115.

Third, the court must consider whether the relationship between the litigant and the person whose rights are asserted makes the litigant "fully or very nearly as effective a proponent of the right as the latter" (*ibid.*). Finally, the court must look to the ability of the third party to assert his own rights. If there is "a genuine obstacle to such assertion . . . the party who is in court becomes, by default, the right and justifiable proponent" (*id.* at 116).

Applications of these principles to the instant case must result in finding that the petitioner h[illegible] had standing to raise the constitutional infringeme[illegible]red by the witnesses Wells and Gordon. First, there is no question that the petitioner, threatened with loss of liberty through a criminal conviction, has a "ca[illegible] and controversy." Second, the witnesses' enjoyment [illegible] their Fifth Amendment right is, as fully discussed above,

seriously "affected" if they can be discredited by being forced to reveal, in violation of the guaranteed secrecy of grand jury proceedings, that they exercised their constitutional right against self-incrimination. In this respect, the witnesses' "enjoyment" of their right is, in fact, utterly dependent upon the outcome of this case. Third, considering the impact on the petitioner, if witnesses called on his behalf are successfully impeached by the government, the petitioner is surely as effective a proponent of the rights at issue here as the witnesses themselves could be. Fourth, and most importantly, unless the petitioner here is permitted to raise the witnesses' constitutional rights in this case, there is, in fact, absolutely no way the witnesses themselves can vindicate those rights. The instant case is stronger in this respect than *Singleton* where the third parties (women seeking abortions) could themselves, albeit with difficulty, bring suit to assert their own rights. Here, no ameliorative suit is possible; indeed, in the recent case of *Imbler v. Pachtman,* 424 U.S. 409 (1976), this Court squarely held that the prosecutor is absolutely immune from civil suit for acts such as those at issue here, taken by him in the course of pursuing a criminal prosecution and in presenting the government's case at trial. Consequently, under *Singleton,* the defendant here is literally "by default, the right's best—if not only available proponent."[23]

[23]The petitioner here thus not only satisfies the requirements of the plurality opinion in *Singleton,* but also meets the more stringent test the concurrent dissent would require. In his concurring opinion, Justice Stevens indicated that to have standing it was probably also necessary that the litigant raising another's constitutional right have his own constitutional claim as well. As will be discussed below, the petitioner here does indeed have his own constitutional claim. Moreover, the dissenters in *Singleton* stated that third party standing should be barred except where it was otherwise virtually impossible for the third party to vindicate his right—as it would be here.

Further, the total lack of civil remedy available to the witnesses in this case distinguish this case from those in which standing has been denied to defendants who seek to raise the Fourth Amendment rights of persons other than themselves. A non-defendant victim of an illegal search and seizure, while without the defendant's remedy of suppression of tainted evidence, may nevertheless vindicate his own Fourth Amendment rights through the vehicle of his suit for damages (see, *e.g., Bivens v. Six Unknown Federal Agents,* 403 U.S. 388 (1971)) or by the implication of criminal penalties for unlawful surveillance. Indeed, in denying standing to a defendant to object to evidence obtained in violation of another's Fourth Amendment rights, the Court has pointed to the availability of criminal penalties to vindicate the victim's rights. *Alderman v. United States,* 394 U.S. 165, 175 (1969). An additional distinguishing factor is that "no rights of the victim of an illegal search are at stake when evidence is offered against another party." *Alderman v. United States, supra,* at 174; in the instant case, of course, the witnesses' rights were directly violated by impeaching them in trial as the court of appeals, at least implicitly, recognized. Finally, as the Court pointed out in *Jones v. United States,* 362 U.S. 257, 261 (1960), evidence from an illegal search is not "inherently unreliable or prejudicial," but violation of the constitutional rights at issue here does, in fact, result in precisely such inherently unreliable and highly prejudicial effects—specifically, the improper inference of

guilt from the mere exercise of the right to remain silent.

Nor is this case controlled by the cases holding that the petitioner may not object if the witness is incorrectly ordered to answer a question despite a valid Fifth Amendment claim and the witness then incriminates himself along with the petitioner, *e.g., Bowman v. United States,* 350 F.2d 913, 916 (9th Cir. 1965). In such a situation, the witness at least will be able to exclude his improperly obtained testimony in any subsequent prosecution that might follow, but the witnesses in this case who did *not* incriminate themselves by remaining silent will under no circumstances have any remedy. If the petitioner in this case cannot assert the rights of his witnesses, then those rights will simply be forfeited.

The Court of Appeals Misapprehended the Prejudice Suffered by Petitioner.

As we have demonstrated above, the court of appeals should properly have applied the stricter test applicable to constitutional error. Nevertheless, irrespective of the test applied, the circumstances present here demonstrate sufficient prejudice to require the action of this Court to reverse the judgment of conviction.

The careful distinction drawn by the court of appeals as to the applicability of the *Kotteakos* standard indicates the court's grave concern as to whether the error could have infected the jury's verdict. Moreover, the approach adopted by the court strongly suggests the court's unwillingness to conclude that the error was harmless beyond a reasonable doubt. In our view, a determination that the error was harmless is clearly

erroneous irrespective of the standard employed. The court's rationalization that the Gordon-Wells testimony is cumulative to the testimony of other defense witnesses is highly disingenuous. This Court has recognized that a reviewing court is not required to cast a stoic eye upon the proceedings, but rather, may use common sense in appraising the actual issues raised by the proceedings. *Ashe v. Swenson,* 397 U.S. 436 (1970). In the instant case, the jury would assuredly not have credited the defense by quantitatively counting petitioner's corroborative witnesses. Here, the prosecutor sabotaged *the entire line of defense* by vigorously arguing that two of the defense's crucial witnesses were *fabricating* their testimony. If the jury accepted the prosecutor's argument, it defies logical analysis to conclude that they would not assume that the other corroborative witnesses were similarly part of the fabricated defense.[24] *Afortiori,* the prejudice where the prosecutor has argued that all the union-employed defense witnesses were "cronies" of petitioner, who "was the goose that laid the golden egg." A careful reading of the prosecutor's argument points up the utter unfairness of the situation which he created by his improper conduct. There was simply no way that petitioner could fairly defend the prosecutor's allegations that the witnesses had fabricated their story. It defies common experience to suggest that the jury would not have been misled by this nonprobative yet highly prejudicial argument.

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[24]Thus, in a bank robbery case, if five defense witnesses provide a consistent alibi defense, yet because of improper impeachment of two witnesses the jury concludes that those two witnesses were perjuring themselves, it is incredible to suggest that the assessment of the credibility of those witnesses does not "spillover" and infect the jury's deliberative processes and evaluation of the credibility of the other witnesses who similarly supported the theory of the defense.

The fundamental unfairness here flows not only to Wells and Gordon, who suffer the public ignominy, loss of reputation and perhaps livelihood by having their earlier invocations of the privilege exposed at this public trial. The primary impact of the unfairness and prejudice is suffered by petitioner—as the prosecutor fully intended. Patently, the purpose of the cross-examination and argument was to destroy petitioner's defense. The totally improper criteria adopted by the prosecutor deprived the petitioner of the opportunity to have the jury evaluate his good faith unaffected by the improper suggestion that the jury could reject the defense because petitioner and his "cronies" fabricated the defense as evidenced by the witnesses' prior refusal to exculpate petitioner at the grand jury.

It does little credit to our courts as symbols of justice to comb the entire record to suggest that the jury may have discredited the witnesses for other reasons. In this case, because of the sanction of the trial court, the prosecutor's strongest argument impugning the witnesses' credibility was the argument which this court must now condemn. Assuredly, the jury could not be presumed to have ignored the prosecutor's argument in assessing the credibility of these two important witnesses. It is similarly illogical to assume that the jury could have credited *any* other corroborative witnesses after accepting the prosecutor's argument that Wells and Gordon had fabricated their testimony on petitioner's behalf subsequent to their grand jury appearances. Under these circumstances, the extreme potential for actual prejudice requires reversal.

II

THE DECISION BELOW SQUARELY CONFLICTS WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WITH RESPECT TO FAILURE TO RECORD GRAND JURY PROCEEDINGS DESPITE TIMELY PREINDICTMENT REQUEST.

At the initial stages of the grand jury proceedings in this matter, petitioner filed a "MOTION TO RECORD ALL PROCEEDINGS BEFORE THE FEDERAL GRAND JURY" (R. 434-435).[25] As part of the motion, counsel, on behalf of petitioner, offered to pay "all added expenses necessitated by such recordation" (*ibid.*).

In support of the motion to record, counsel pointed out that the record demonstrated that the prosecutor in the instant case was overzealous and that there was reason to justifiably fear prosecutorial misconduct.[26]

The district court denied the motion, without opinion (R. 450).

Subsequent to the Indictment, as part of the pretrial motions, petitioner moved to dismiss the Indictment

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[25]Specifically, counsel requested the recordation of:

A. The entire testimony of all witnesses;

B. All remarks and comments of the prosecutors of any nature whatsoever; and

C. All instructions of law, general or special, given to said grand jury (R. 434).

[26]Counsel relied upon pleadings filed in the district court, and an *ex parte* letter written by the prosecutor to a district judge accusing petitioner and his attorney (not present counsel) of obstruction of justice. That letter and present counsel's response are found at Appendix D and Appendix E, respectively.

for failure to record the grand jury proceedings, despite request (R. 333-344). This motion was also denied.

On appeal, petitioner contended that under the circumstances, the court improperly refused to require recordation. The court of appeals concluded that while "the far better practice is to record grand jury proceedings, including the comments of the prosecutor, . . . [n]evertheless there remains no constitutional or statutory requirement of recording." (559 F.2d at 988, App. A). While the court "[a]ssum[ed] a defendant's substantive right to dismiss an indictment based on prosecutorial misconduct so flagrant as to deny fundamental fairness", the court determined that it could not "regard [petitioner's] speculation as a sufficient demonstration of need to require reversal for the district court's failure to require recording, to order production of existing grand jury records, or to conduct a hearing inquiring into the prosecutor's action." (*Ibid.*).

The court of appeals thus digressed from the rule established by the United States Court of Appeals for the Ninth Circuit in *United States v. Thoresen,* 428 F.2d 654, 666 (1970) and *United States v. Price,* 474 F.2d 1223, 1225 (1973). In *Thoresen,* the court asserted that the proper time to request recordation was at the pre-indictment stage of the proceedings:

> [T]he fact that a particular discovery procedure is "permissive rather than mandatory" does not mean that permission may be arbitrarily denied. Where a defendant, anticipating future grand jury proceedings involving himself, gives notice in advance that he will seek a transcript of the proceedings if the indictment is returned and offers to pay the expenses of having a reporter in attendance or shows inability to pay, a sound exercise of discretion would ordinarily call for the granting of a motion that a reporter be in attendance.

In the later case of *United States v. King,* 478 F.2d 494, 507 (9th Cir. 1973), the court characterized the government's failure to record grand jury testimony as "arrogant" and cautioned (at 508):

> We repeat our previous warnings however; the Government is courting disaster when it fails to record grand jury proceedings and the judges should exercise their discretion to require such recording.

In *United States v. Price, supra,* the court established the rule now applicable in the Ninth Circuit.

> We adhere to the principles stated in *Thoresen,* and we now implement them by holding that the district court must exercise its discretion in passing upon a preindictment motion for recordation of grand jury proceedings and that a district court abuses its discretion in denying the motion of parties situated as were appellants, in absence of a Government showing that it has a legitimate and compelling interest to be served by non-recordation. The Government cannot meet its burden by resort to the secrecy rubric. Secrecy of grand jury proceedings is not jeopardized by recordation. The making of a record cannot be equated with disclosure of its contents, and disclosure is controlled by other means.

The court below refused to follow the lead of the Ninth Circuit. Thus, there exists a significant conflict which requires this Court's resolution.

Rule 6(d) of the Federal Rules of Criminal Procedure provides in pertinent part:

> "[A] stenographer or operator of a recording device may be present while the grand jury is in session . . ."

The developing law is now legion that it is better practice to record. *United States v. Peden,* 472 F.2d 483 (2d Cir. 1973); *United States v. John,* 408 F.2d 1134 (8th Cir. 1975) *United States v. Cianchetti,* 315 F.2d 584, 591 (2d Cir. 1963); *United States v. Cramer,* 447 F.2d 210, 214 (2d Cir. 1971); *United States v. Battisti,* 486 F.2d 961 (6th Cir. 1973); *Schlinksy v. United States,* 379 F.2d 735, 740 (1st Cir. 1967); *United States v. Aloisio,* 440 F.2d 705 (7th Cir. 1971).

From the standpoint of justice, there is simply no compelling reason not to require recordation of all the proceedings, including the prosecutor's comments. Where, as here, there is *prima facie* evidence of a zealous prosecutor, there can be no sound reason to deny recordation. The strong policy underlying recordation was stated forcefully by the Honorable Judge Pettine of Rhode Island in *United States v. Gramolini,* 301 F.Supp. 31, 41-42 (D.C.R.I. 1969). See also *United States v. Battisti,* 486 F.2d 961 (6th Cir. 1973) (rejection of government challenge to a local district court rule requiring recordation).

Emerging from the present line of cases is the firm notion that there are no disadvantages in requiring recordation. Recordation can only serve to further the ends of justice.

Moreover, there is no reason to distinguish between recordation of testimony of witnesses and recordation

of the comments of the prosecutor. *United States v. Messitte,* 324 F.Supp. 334 (S.D.N.Y. 1971); *United States v. Peden,* 472 F.2d 583, 584 (2d Cir. 1973). See ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function, §35(c) (Approved Draft); See also 8 Moore's *Federal Practice* at ¶6.02(2), p. 611 (Cipes Ed., 1969).

The court of appeals correctly assumed a defendant's substantive right to dismissal of an indictment where flagrant prosecutorial misconduct denied fundamental fairness. See *United States v. Basurto,* 497 F.2d 781 (9th Cir. 1974); *Wood v. Georgia,* 370 U.S. 374, 390 (1962); *United States v. Chanen,* 549 F.2d 1306 (9th Cir. 1977); *United States v. Gallo,* 394 F.Supp. 310 (D.Conn. 1975); *United States v. DeMarco,* 401 F.Supp. 505 (C.D. Cal. 1975). The court's conclusion that petitioner's contentions were "speculation" demonstrates the need for the prophylactic rule which we espouse and which is now the law in the Ninth Circuit. Since prosecutorial misconduct can rise to sufficient proportions to require dismissal of an indictment, it necessarily follows that recordation is essential to vindicate the right. If the prosecutor's comments are not recorded, as here, any suggestion of prejudice is necessarily speculative. Moreover, the court below engaged in circular reasoning in concluding that petitioner had not made a sufficient demonstration of prejudice to require production of the existing grand jury records or to require a hearing. Manifestly, by escaping recordation of his comments, the prosecutor renders any disclosure of the other recorded proceedings, or indeed, a hearing, entirely meaningless.

Fundamental fairness dictates that a prosecutor not be given free reign to inflame or prejudice a grand

jury. It is beyond contradiction that a prosecutor holds a high place in the esteem of lay grand jurors and the chance of improper influence is high, even if based on good intentions. If a prosecutor knows that his comments are on the record and subject to review, the only possible effect would be to further the interests of justice.

In our view, the court below seriously erred in not requiring recordation, where there was colorable overzealousness and a timely preindictment request. This Court's review is thus necessary to establish a rule of uniform application on this matter of extreme importance to the administration of justice.

Conclusion.

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

RICHARD L. ROSENFIELD,
Attorney for Petitioner.

FLAX AND ROSENFIELD,
Of Counsel.

APPENDIX A.

UNITED STATES of America, Plaintiff-Appellee, v. Bernard G. RUBIN, Defendant-Appellant. No. 76-1143.

United States Court of Appeals, Fifth Circuit.

Sept. 22, 1977.

Defendant was convicted on various charges relating to his role in financial operations of several laborers' organizations. In the United States District Court for the Southern District of Florida at Miami, Peter T. Fay, Jr., he was found guilty of embezzlement of union and employee welfare benefit plan funds, racketeering, false statements on income tax returns, and failure to keep labor union records. Defendant was also ordered to forfeit all his union and trust fund positions as well as his right to seek such positions in the future. The defendant appealed. The Court of Appeals, Goldberg, Circuit Judge, held that (1) defense witnesses should not have been cross-examined regarding their prior refusals to testify before the grand jury, but the error was harmless in view of the evidence, and (2) defendant was properly ordered to forfeit the positions he held but could not properly be ordered to forfeit his right to seek such offices in the future.

Judgment of conviction affirmed; order of forfeiture modified, and, as modified, affirmed.

1. Witnesses 347

Government bears burden of establishing threshold inconsistency necessary for admission of impeachment evidence of witness' prior silence.

2. Witnesses 347

Where grand jury witness had properly invoked privilege against self-incrimination, "insoluble ambiguity" of his silence precluded demonstration that such silence was inconsistent, for impeachment purposes, with his subsequent testimony. U.S.C.A.Const. Amend. 5.

3. Witnesses 347

That witness against whom his prior silence before grand jury was admitted for impeachment purposes was not a defendant himself did not render inapplicable the requirement of threshold inconsistency nor provide any additional basis for concluding that requirement was met, where witness in testifying before grand jury could have been justified in conclusion that he was being interrogated for express purpose of supplying evidence against himself. U.S.C.A.Const. Amend. 5.

4. Witnesses 347

Government may not attempt to impeach defense witness by eliciting his prior refusal to testify before grand jury, where he has not conveyed impression that he affirmatively cooperated with Government in all matters relating to case.

5. Constitutional Law 266(1)
Witnesses 347

Admission, for impeachment purposes, that witness other than defendant had been silent before grand jury was violation of rules of evidence but was not constitutional error as to defendant, at least where evidence was not so critically prejudicial as to rise to level of due process violation. U.S.C.A.Const. Amend. 5.

6. Criminal Law 1169.1(1)

Where error in admission of evidence was nonconstitutional, harmless error test was whether error had substantial influence, i.e., whether court could say with fair assurance, after pondering all that happened without stripping erroneous action from the whole, that judgment was not substantially swayed by the error.

7. Criminal Law 1162

Alleged heinousness of crime is never appropriate consideration in testing whether error is harmless.

8. Criminal Law 1170½(1)

In view of evidence available, which was overwhelmingly convictive in prosecution for embezzlement of union and employee welfare benefit plan funds, rackeeteering, false statements on income tax returns and failure to keep labor union records, nonconstitutional error in admission, for impeachment purposes, of evidence that defense witnesses other than defendant had remained silent before grand jury tainted trial at most to such marginal extent that convictions would be affirmed. 18 U.S.C.A. §§ 664, 1962(c); 26 U.S.C.A. (I.R.C.1954), § 7206(1); Labor-Management Reporting and Disclosure Act of 1959, §§ 2-611, 206, 209, 501(c), 29 U.S.C.A. §§ 401-531, 436, 439, 501(c); U.S.C.A.Const. Amend. 5.

9. Labor Relations 1057

That defendant was good union man was not defense to requirement of modicum of accountability for monies expended for the union. Labor-Management Reporting and Disclosure Act of 1959, §§ 2-611, 501(c), 29 U.S.C.A. §§ 401-531, 501(c).

10. Criminal Law 1166(2)
Grand Jury 40

Far better practice is to record grand jury proceedings, including comments of prosecutor, but there remains no constitutional or statutory requirement of recording, and failure to do so, standing alone, provides no predicate for reversal.

11. Criminal Law 627.9(1)

Defendant may obtain what grand jury records do exist, or receive hearing on what has transpired in grand jury room, upon showing of need, but showing must include more than unsubstantiated, speculative assertions of impropriety in proceedings.

12. Criminal Law 1166(1, 2)

Assuming a defendant's substantive right to dismiss indictment based on prosecutorial misconduct, before grand jury, so flagrant as to deny fundamental fairness, defendant's speculation that prosecutor by concentrating his questioning of several witnesses on their conversations with their own or defendant's lawyers improperly misinformed grand jury that defendant was obstructing investigation was not sufficient demonstration of need for grand jury records as to require reversal for district court's failure to require recording of prosecutor's comments before grand jury, to order production of existing grand jury records or to conduct hearing inquiring into prosecutor's action.

13. Criminal Law 394.5(1)

To trigger Government's obligation to affirm or deny, there must at least be a positive statement that unlawful surveillance has taken place, and an allegation that it may have occurred will not suffice. 18 U.S.C.A. § 3504(a)(1).

14. Criminal Law 394.5(1)

Though there was no requirement that allegation be sworn, defendant's allegation that he had "reason to believe" someone had eavesdropped on conversations in his office was insufficient without supporting evidence to trigger Government's obligation to affirm or deny. 18 U.S.C.A. § 3504(a)(1).

15. Criminal Law 394.5(1)

Government was to be cautioned against further use of form of limited response to allegation concerning asserted unlawful surveillance; unadorned denial of illegal surveillance may suffice to meet barest, most general accusation, but response must unequivocally deny occurrence of illegal surveillance, apart from any question whether evidence against defendant was obtained thereby. 18 U.S.C.A. § 3504(a)(1).

16. Criminal Law 800(2)

In prosecution under statute making it unlawful for any person employed by any enterprise engaged in interstate commerce to conduct or participate in conduct of such enterprise's affairs through pattern of racketeering activity, trial judge did not err in refusing defendant's requested instruction which included statement that "through" means "by means of." 18 U.S.C.A. §§ 1961(1, 5), 1962(c); Labor-Management Reporting and Disclosure Act of 1959, § 501(a), 29 U.S.C.A. § 501(a).

17. Criminal Law 1177

In view of concurrent sentences imposed upon convictions on various counts, on some of which convictions were sustained, it was not necessary for Court of Appeals to reach defendant's contentions pertinent to other counts.

18. Threats 8

Congress intended to use every possible means to separate those found guilty of racketeering activity and their confederates from enterprises they had conducted through such activity, to increase variety and strength of federal prosecutorial weapons designed to root out and keep out influence of organized crime in legitimate business and labor organizations, and to provide for forfeiture of any ownership or investment type of interest a defendant might hold in an organization he had conducted through pattern of racketeering activity. 18 U.S.C.A. §§ 1962, 1963, 1963(a), 3563.

19. Embezzlement 52

Forfeiture provision of Organized Crime Control Act of 1970 reached union offices occupied by defendant convicted of embezzlement and other offenses; his various offices fell within language of "any interest in, security of, claim against, or property or contractual right of any kind" but his right to seek and reattain such offices, which right is independently regulated by provisions of federal labor statutes, was not within reach of such provision and it was error to bar him in perpetuity. 18 U.S.C.A. §§ 1962, 1963, 1963(a), 1964, 3563; Labor-Management Reporting and Disclosure Act of 1959, § 504, 29 U.S.C.A. § 504; Employee Retirement Income Security Act of 1974, § 411, 29 U.S.C.A. § 1111.

See publication Words and Phrases for other judicial constructions and definitions.

20. Statutes 241(2)

Forfeiture provision of Organized Crime Control Act of 1970 was to be strictly construed as criminal statute, and any ambiguity was to be resolved in favor of

lenity, which canon had particular application to forfeiture statutes. 18 U.S.C.A. §§ 1963, 1963(a).

21. Threats 8

In enacting forfeiture provision of Organized Crime Control Act of 1970, although Congress' primary concern was to eradicate organized crime's economic base, which more readily translates into ownership interests, it also intended forfeiture fully to serve broader goal of legally separating persons who run enterprise through defined racketeering activity from enterprise itself. 18 U.S.C.A. §§ 1963, 1963(a).

22. Labor Relations 124

That union offices forfeited by convicted defendant could not be meaningfully transferred to United States was of no moment, in view of statute providing that forfeited interest not exercisable by United States shall terminate. 18 U.S.C.A. §§ 1963, 1963(c); Labor-Management Reporting and Disclosure Act of 1959, § 401(e), 29 U.S.C.A. § 481(e).

Richard L. Rosenfield, Los Angeles, Cal., for defendant-appellant.

Robert W. Rust, U. S. Atty., Miami, Fla., Ivan Michael Schaeffer, Atty., T. George Gilinsky, Dept. of Justice, Washington, D.C., Jerome M. Feit, Atty., Marty Steinberg, Sp. Atty., Dept. of Justice, Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before GOLDBERG and HILL, Circuit Judges and KERR,* District Judge.

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*Senior District Judge of the District of Wyoming, sitting by designation.

GOLDBERG, Circuit Judge:

Bernard G. Rubin appeals from his conviction of charges relating to his role in the financial operations of several southern Florida laborers' organizations. Appellant is a Special International Representative of the Laborers' International Union of North America. He is President of the Southwest Florida Laborers' District Council (hereinafter "District Council"), an umbrella organization supervising several locals. He is President of the Concrete Products & Material Yard Workers Local #666, Business Manager of Local #478, and a trustee of several labor trust funds.

Following a two week trial a jury found appellant guilty of 103 counts of the 105 count indictment charging embezzlement of union and employee welfare benefit plan funds, 29 U.S.C. § 501(c), 18 U.S.C. § 644; racketeering, 18 U.S.C. § 1962(c); false statements on income tax returns, 26 U.S.C. § 7206(1); and failure to keep labor union records, 29 U.S.C. §§ 436, 439. The court imposed concurrent sentences on all counts up to a maximum of five years imprisonment. The court levied fines totalling $50,000.00 on five different counts. Finally, the court ordered appellant to forfeit all his union and trust fund positions as well as his right to seek such positions in the future.

Eighty-six counts of the indictment charged appellant with embezzling funds from the various unions and trust funds by submitting to those entities duplicate expense vouchers, mostly for travel and entertainment, thereby receiving multiple reimbursements for expenses incurred. With respect to each expense covered by the indictment, appellant had sent a voucher to each of two or more of the organizations and received

reimbursement. The government credited one reimbursement of each expense as legitimate, charging embezzlement only on the duplications. Appellant did not deny the fact of these many multiple reimbursements. Rather, he maintained that he employed the duplicate billing system to create a cash fund he needed for additional union related expenses. Rubin asserted that he had understood his power of the purse in the various organizations to encompass accumulating such a fund and making such expenditures. Numerous defense witnesses testified that he had spent large amounts of cash in past organizing drives and in entertaining management.

Additionally, the indictment charged appellant with two counts of embezzlement through granting himself over $300,000 in unauthorized salary increases as an officer of local 666 and the District Council. The charges of inadequate recordkeeping largely related to required documentation of union treasury disbursements. The tax counts charged false subscribing of income tax returns, in that appellant received substantial income in excess of the amount reported. Finally, on the basis of the embezzlement allegations appellant was charged with conducting or participating in the conduct of the union organizations through a pattern of racketeering activity.

On appeal Rubin proffers several claims of error. We agree with appellant's contention that two of his defense witnesses should not have been cross-examined regarding their prior refusals to testify before a grand jury, but we find the error harmless in the circumstances. We reject appellant's remaining claims of error in the conviction. Finally, though we think the distict court properly ordered Rubin to forfeit the positions

he presently holds, we must reverse its order that he forfeit his right to seek such offices in the future.

I. Defense Witnesses' Silence Before the Grand Jury.

Appellant's most troubling challenge to the validity of the conviction relates to the government's attempt to impeach two defense witnesses by eliciting on cross-examination their prior refusals to testify before a grand jury. We conclude that the trial court violated evidentiary canons by permitting such impeachment.

In light of the cumulative nature of the witnesses' testimony, the substantial proper impeachment of these and all other defense witnesses, and the inherent implausibility of appellant's defense theory, however, we cannot conclude that the error here requires reversal.

Kenton Wells, an organizer for the District Council, and Jack Gordon, an organizer for the District Council and local 666, were two of eight witnesses who corroborated appellant's story that during the relevant years he had handed out large amounts of cash to subordinates for use in organizing campaigns and had spent large amounts of cash entertaining management figures. Appellant testified these expenditures required a large cash fund which he maintained through the multiple billing of the various union entities for yet other expenses. Rubin claimed he had understood that accumulating funds in this manner and disbursing them for general organizing purposes fell within the authority granted him by the District Council and local 666. The defense witnesses, Wells and Gordon among them, corroborated only the fact of numerous disbursements for organizing and entertaining. They gave no testimony regarding the source of Rubin's funds.

In an effort to impeach the testimony of Wells and Gordon through proof of a prior inconsistent act, the prosecution brought out on cross-examination the witnesses' previous refusals to testify before the federal grand jury investigating the activities of southern Florida laborers' organizations. Of Wells the government inquired as follows:

Q. Without respect to the exact date, sir, did you appear twice before the Federal Grand Jury?

A. Yes, sir.

Q. Were you asked questions concerning your labor-union activities and Mr. Rubin?

A. Yes, sir.

Q. Did you refuse to testify on both of those occasions?

A. Yes, sir, I did. (T. 1522-23).

At one time during the colloquy, set out in its entirety in the margin,[1] Wells volunteered that he "had taken

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[1]Q. Mr. Wells, I notice that Mr. Flax asked you your occupation.

A. Yes, sir.

Q. Have you ever given a different response on a previous occasion?

A. Not that I know of as far as my occupation. No, I don't.

Q. Do you remember testifying to a Federal Grand Jury on April 29, 1975?

MR. ROSENFIELD: Can I have a copy of that, Counsel?

MR. STEINBERG: I don't have extra copies, Mr. Rosenfield.

A. Yes, I do, 1975.

MR. ROSENFIELD: Before he inquires, I would like an opportunity to take a look at the document.

MR. STEINBERG: It's not part of discovery, Your Honor. I only have one copy. It's not discovery.

THE COURT: Let him look over your shoulder or read what you are reading.

MR. ROSENFIELD: That is fine.

I object to the characterization as not being discoverable. It is now discoverable.

(This footnote is continued on next page)

the Fifth Amendment." (T. 1521). Similarly, the following exchange took place during the cross-examination of Jack Gordon:

Q. Mr. Gordon, did you appear at the Federal Grand Jury on May 27, 1975?

Q. Mr. Gordon, did you appear at the Federal Grand Jury on May 27, 1975?

BY MR. STEINBERG:
Q. Did you ever give a different response on a previous occasion, Mr. Wells?
A. Not that I know of, sir.
Q. Did you testify in the Federal Grand Jury on April 29, 1975, sir?
A. This year?
Q. That's correct.
A. No, sir, I didn't.
Q. You did not?
A. I came before the Federal Grand Jury.
Q. Were you asked this question:
"Q. What is your occupation?"
A. I was asked that question.
Q. Did you give the same response that you gave to Mr. Flax?
A. I gave my address at that time, sir, 836 West Drive.
Q. After you gave your address, were you asked your occupation?
A. Yes.
Q. Did you give the same response that you gave Mr. Flax?
A. No, sir. I took the Fifth Amendment.
MR. FLAX: May we approach the bench, Your Honor?
THE COURT: Come right up.
(Side-bar conference:)
MR. ROSENFIELD: Your Honor, I would suggest that because the man answered the question before the grand jury that he refused to answer on the ground that it might tend to incriminate him, this would be improper and highly prejudicial. There is nothing inconsistent about a witness' trying to invoke the Fifth Amendment in front of a grand jury and testifying here. There is nothing inconsistent about that at all. This kind of questioning is improper.
I would suggest that before counsel be allowed to interrogate him with respect to that document, that I be allowed to take a look at it.

A. I don't remember the date. I appeared there, yes, at the grand jury.

Q. Did you ever refuse to testify?

A. Yes, I did. (T. 1622-23).

THE COURT: I have overruled your objection. You can certainly bring out that he refused to testify before the grand jury. I think that is proper cross-examination.
I do not think we need fifty questions to do it. If he refused to answer all the questions, I think we can bring that out and then drop it.
MR. STEINBERG: Fine.
(Side-bar conference concluded.)
BY MR. STEINBERG:
Q. Mr. Wells, were you called to testify before the Federal Grand Jury on two occasions, October 29, 1974, and April 29, 1975?
A. Sir, I could not possibly swear to that because I don't have anything at all to tell me what time that I went up there. You could ask me a question of that nature and I can't tell you exactly what date or when those specifics took place.
Q. Without respect to the exact date, sir, did you appear twice before the Federal Grand Jury?
A. Yes, sir.
Q. Were you asked questions concerning your labor-union activities and Mr. Rubin?
A. Yes, sir.
Q. Did you refuse to testify on both of those occasions?
A. Yes, sir, I did.
Q. Mr. Wells, during any of those occasions did you tell the grand jury or the Government about this fund of cash that you were receiving?
MR. ROSENFIELD: I will object to that, Your Honor. He testified he has not testified before. Any other question he would be incompetent to answer. He said he did not testify.
THE COURT: I think this question has two parts and I will sustain the objection. I think he has answered that part dealing with the grand jury. I am not so sure he answered the part dealing with the Government, if that means someone other than the grand jury.
THE WITNESS: Would you repeat the question, sir.
BY MR. STEINBERG:
Q. Mr. Wells, I will rephrase the question.
Have you ever told the Government before about this cash that you were receiving from Mr. Rubin to organize?
A. I don't recall telling the Government anything, sir. (T. 1519-24).

The trial court overruled defense counsel's objections to both these lines of inquiry. As part of his discussion of the defendant's case during closing argument, the prosecutor commented on the testimony of Wells and Gordon, plainly stating that he saw a contradiction between their corroboration of appellant's exculpatory story and their refusals to speak to the grand jury.

A. Improper Impeachment Under Evidentiary Guidelines

Appellant asserts that admission of the witnesses' silence before the grand jury, exacerbated by the prosecutor's reference during argument, was error. We agree that under well-established evidentiary principles the impeachment was improper.

1. *The Requirement of Inconsistency Between Silence and Testimony*

[1, 2] In *United States v. Hale,* 422 U.S. 171, 95 S.Ct. 2133, 2136, 45 L.Ed.2d 99 (1975), the Supreme Court reiterated the governing principles:

> A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent. 3A J. Wigmore, Evidence § 1040 (Chadbourne rev. 1970). If the Government fails to establish a threshold inconsistency between silence . . . and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded.

See also Grunewald v. United States, 353 U.S. 391, 418-19, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). In

Hale, the Court concluded that a defendant's silence in the circumstances following arrest and *Miranda* warnings lacked the requisite inconsistency with his exculpatory trial testimony and that such silence was therefore inadmissible for impeachment purposes. More recently the Court has held that the impeachment use of a defendant's post-arrest, post-*Miranda* warning silence violated the due process clause. *See Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

For present purposes we limit our analysis to the evidentiary framework employed in *Hale.* Into that framework we must place, not a defendant, but a defense witness and, not the circumstances of a post-arrest police interrogation, but those of the grand jury room. The question before us is whether the prior silence of a defense witness before the grand jury conveys the threshold inconsistency with the witness's exculpatory trial testimony that is necessary to permit the use of the silence to impeach the testimony. We hold that it does not.

2. *Silence and the Grand Jury*

Grunewald v. United States, supra, precludes any suggestion that silence before the grand jury is more probative than silence following arrest. In the circumstances of *Grunewald,* the Supreme Court squarely rejected the argument that the defendant's invocation of the privilege against self-incrimination before the grand jury had "involved such inconsistency with any of his trial testimony as to permit its use against him for impeachment purposes." 353 U.S. at 419, 77 S.Ct. at 981.

To reach that conclusion the Court placed significant reliance on factors always attendant upon appearing before a grand jury:

> [T]he Fifth Amendment claim was made before a grand jury where [defendant] was a compelled, and not a voluntary, witness; where he was not represented by counsel; where he could summon no witness; and where he had no opportunity to cross-examine witnesses testifying against him. These factors are crucial in weighing whether a plea of the privilege is inconsistent with later exculpatory testimony on the same questions, for the nature of the tribunal which subjects the witness to questioning bears heavily on what inferences can be drawn from a plea of the Fifth Amendment. Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedure provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth.

Id. at 422-23, 77 S.Ct. at 983 (citation omitted).

The Court also emphasized that the grand jury had considered the defendant a potential target for indictment at the time of his appearance. Therefore "it was quite natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself," and "quite consistent with innocence for him to refuse to provide evidence which could be used by the Government in building its incriminating chain." *Id.* at 423, 77 S.Ct. at 983.

Both the general nature of grand jury proceedings and the particular situation of the defendant thus fed the Court's conclusion that his invocation of the privilege had been "wholly consistent with innocence" and consequently inadmissible to impeach the defendant's exculpatory trial testimony. *See id.* at 421-22, 77 S.Ct. 963. Given the risk that the jury had drawn an inference of guilt from the exercise of the privilege, the Court found the error in admitting the evidence for impeachment purposes prejudicial. *See, id.* at 423-24, 77 S.Ct. 963.

When Wells and Gordon appeared before the grand jury investigating the laborers' unions of southern Florida, they faced the same uncertainties and pressures that *Grunewald* found inherent in the grand jury's secret *ex parte* proceedings. Insofar as the record reveals, the two witnesses also could have been justified in the conclusion that they were being interrogated for the express purpose of supplying evidence against themselves. They of course could invoke the privilege properly only to avoid incriminating themselves; the government has never levied the charge that either improperly claimed the protection of the fifth amendment.

The government bears the burden of establishing the threshold inconsistency necessary to admit impeachment evidence. *See United States v. Hale, supra,* 95 S.Ct. at 2136. So long as a grand jury witness has properly invoked the privilege against self-incrimination, the "insoluble ambiguity" of his silence, *See Doyle, supra,* 96 S.Ct. at 2244, precludes demonstration of that requisite inconsistency. Accordingly, the predicate for impeachment use of Wells' and Gordon's grand jury silence was lacking.

3. *Prior Silence of a Defense Witness*

[3] That we are concerned with the testimony of defense witnesses, rather than a defendant, neither renders inapplicable for requirement of threshold inconsistency nor provides any additional basis for concluding that the requirement was here met. The Eighth Circuit has squarely applied *Grunewald* in the witness context. *See United States v. Williams,* 464 F.2d 927 (8th Cir. 1972). Drawing on *Grunewald's* description of the nature of grand jury proceedings, the court in *Williams* rejected the argument that the refusal of a defense witness to testify before a grand jury was inconsistent with his trial corroboration of the defendant's exculpatory story. The court concluded that the improper impeachment had been prejudicial where the single defense witness's corroboration had been critical, and it reversed the conviction. Similarly, the Second Circuit has stated that where a witness, who is later to supply exculpatory testimony for a criminal defendant, has a reasonable belief at the time of a grand jury appearance that he may be a defendant himself,

> . . . it is perfectly consistent with innocence and with nonincriminatory answers to particular questions to refuse to answer any question at all.

United States v. Tomaiolo, 249 F.2d 683, 691 (2d Cir. 1957).

See also United States v. Natale, 526 F.2d 1160 (2d Cir. 1975), *cert. denied,* 425 U.S. 950, 96 S.Ct. 1724, 48 L.Ed.2d 193 (1976); *United States v. Glasser,*

443 F.2d 994, 1004-06 (2d Cir.), *cert. denied,* 404 U.S. 854, 92 S.Ct. 96, 30 L.Ed.2d 95 (1971).[2]

The conclusion of these two courts that a defense witness's prior silence before a grand jury and trial testimony exculpating the defendant lack sufficient inconsistency to justify impeachment use of the silence is well-founded. *Grunewald* teaches that the many factors that may lead an individual to remain silent before the grand jury make it impossible to draw any reasonable inference that a subsequent protestation of his own innocence has been fabricated. Assuming a reasonable belief at the time of the witness's grand jury appearance that he himself may be a defendant, any suggestion of inconsistency between his silence and subsequent testimony exculpatory of someone else can certainly be no stronger.

4. *The Potential for Prejudice*

As against the complete lack of probative value in the defense witness's refusal to testify before the grand jury, impeachment by that silence runs some risk of two varieties of prejudice. First, where the jury learns that the witness's silence was an exercise of the privilege against self-incrimination, there is a

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[2]*Natale* and *Glasser* are concerned more directly with the prejudicial impact of explicit attempts to elicit from a defense witness the fact that he previously exercised the fifth amendment privilege, rather than the lack of probative impeachment value in witness's prior silence. Therefore these cases do not explore the issue of consistency between grand jury silence and exculpatory trial testimony. The opinions do cite *Williams* and *Tomaiolo* with approval, however, and they make clear that a defense witness' prior silence before a grand jury is not a proper subject of cross-examination in the Second Circuit.

danger the jury will improperly infer guilt on the part of the witness and, depending on the circumstances, transfer that inference to the defendant. *See United States v. Natale, supra; United States v. Glasser, supra.* Second, without an understanding of the uncertainties a witness faces in testifying before a grand jury, a juror may well attribute undue significance to the fact a witness offered no response to the prosecutor's questions before that tribunal and may thereupon disbelieve the witness's trial testimony. To allay any such tendency would require the defense somehow to instruct the petit jury on the difficulties of testifying before a grand jury, an abstract digression that would at best distract the jurors and at worst unduly emphasize the issue of silence, exacerbating any tendency to draw the improper substantive inference that the witness was hiding guilt that may taint the defendant.[3]

[4] A defense witness's prior refusal to supply testimony to a grand jury before which he had a reasonable belief that he might be a defendant himself has no proper significance as impeachment evidence. Use of the evidence for that purpose risks prejudice. Accordingly, we hold that the government may not attempt

[3]In a similar vein the D.C. Circuit has held that a prosecutor cannot attempt to impeach a defense witness by eliciting on cross-examination that the witness had not testified at the defendant's preliminary hearing. See *United States v. Huff,* 143 U.S.App.D.C. 163, 442 F.2d 885 (1971). Given the many reasons for the defense not to put on evidence at such a hearing, the court found the witness's failure to testify there of little if any probative value. The court also recognized that a jury might tend to find significance in the failure to testify. Rather than require defense counsel to combat that prejudicial tendency with a demonstration of the general nature of preliminary hearings and the particular considerations that governed the hearing in question, the court prohibited the impeachment use of a witness's failure to testify at a preliminary hearing.

to impeach a defense witness by eliciting such a prior refusal to testify before a grand jury.[4]

B. The Constitution Inviolate

[5] Appellant argues that the impeachment use of the prior silence of Wells and Gordon not only violated the rules of evidence, but also transgressed constitutional boundaries staked out in *Doyle v. Ohio, supra. Doyle* did elevate to a constitutional level the Court's earlier holding that impeachment use of a defendant's post-arrest, post-*Miranda* warning silence was improper as an evidentiary matter. *See United States v. Hale, supra.* Because we find that the Court's reasons for being party to that particular ascension do not transfer to the situation before us, we reject appellant's claim of constitutional error.

Certainly the *Doyle* Court reaffirmed the recognition in *Hale* of the inherent ambiguity of post-arrest silence. However, the Court expressly noted that its consideration of the lack of probative value of the Ohio defendants' silence was unnecessary to its constitutional holding. *Id.* 96 S.Ct. at 2444-45 n. 8. Rather, that holding followed from the fundamental unfairness of employing a person's invocation of the right against self-incrimination to his disadvantage as he stands trial.

Justice Powell's majority opinion described that unfairness in the context presented by *Doyle* of post-*Miranda* warning silence:

[4]This holding of course does not apply to the type of situation discussed in *United States v. Fairchild,* 505 F.2d 1378 (5th Cir. 1975), and noted in *Doyle v. Ohio, supra,* 96 S.Ct. at 2245 n. 11, in which the defendant (here, a defense witness) has conveyed the impression that he affirmatively cooperated with the government in all matters relating to the case.

> . . . while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. 96 S.Ct. at 2245.[5]

That same unfairness may be present whenever the government attempts to exploit a proper invocation of the privilege, whether or not preceded by explicit warnings of the right to remain silent. Thus, whatever the ultimate validity of the proposition that *Miranda*-type warnings are required in the grand jury room, *see United States v. Washington,* ..... U.S. ....., 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977); *United States v. Wong,* ..... U.S. ....., 97 S.Ct. 1823, 52 L.Ed.2d 231 (1977); *United States v. Mandujano,* 425 U.S. 564, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976), the factors found constitutionally intolerable in *Doyle* might be thought to extend to a defendant's silence in the face of grand jury questioning.

We need not resolve this question today. A defendant cannot complain where the prosecutorial abuse is of *another's* exercise of the constitutional privilege against

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[5]The Court went on to quote with approval from Justice White's concurrence in the judgment in *United States v. Hale, supra,* 95 S.Ct. at 2139. "Surely *Hale* was not informed here that his silence, as well as his words, could be used against him at trial." *Doyle, supra,* 96 S.Ct. at 2245.

self-incrimination.[6] That privilege is a personal one. It is established that a defendant may not object to the violation of another person's privilege. *See Doyle, supra,* 96 S.Ct. at 2248 (Stevens, J., dissenting) and cases cited. Thus a defendant cannot complain of any *Doyle*-type unfairness that might be seen in impeachment of a defense witness by a prior refusal to testify before a grand jury.[7]

C. Error Harmless

[6] Because we have found the error in impeaching Wells and Gordon by their grand jury silence to be nonconstitutional, the strict guidelines set out in *Chapman v. United States,* 547 F.2d 1240, 1249-50 (5th Cir. 1977), for testing the harmlessness beyond a reasonable doubt of a *Doyle* violation are inapplicable. Rather we must apply the test of *Kotteakos v. United States,* 328 U.S. 750, 764-65, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946):

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[6]*Doyle* itself specifically reserved the question whether constitutional error would obtain upon the use of post-arrest, post-*Miranda* warning silence to impeach a defense witness rather than the defendant.

[7]Note that in *United States v. Sobell,* 314 F.2d 314 (2d Cir. 1963), the court opined that on the assumption the *Grunewald* holding achieved constitutional dimensions, those constitutional implications would be limited to the person whose claim of the privilege was used against him.

Beyond the unfairness of exploiting a claim of the privilege, we cannot conclude that the grand jury silence of a defense witness is so utterly lacking in probative value yet highly charged with prejudicial potential that its use merits universal constitutional condemnation. We need not forecast whether the use of such evidence might in some particular case be so critically prejudicial as to rise to the level of a due process violation. The case at bar, however, is not such a case.

> . . . if [we] cannot say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

See United States v. Constant, 501 F.2d 1284, 1289 (5th Cir. 1974), *cert. denied,* 420 U.S. 910, 95 S.Ct. 830, 42 L.Ed.2d 840 (1975).[8]

[7,8] Oft times the alleged heinousness of a crime provides the judicial vehicle for a finding of harmless error. That factor, however, is never an appropriate consideration. Here, in reading and examining the record, we have attempted to strain out the quality of the alleged crime and to confine our attention to the residue of its basic factual underpinnings. The nature of the crime has not entered our evaluation of the evidence, which we find to be overwhelmingly convictive. Cognizant that "harmless-error rules can work very unfair and mischievous results", *Chapman v. California,* 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967), we are nevertheless convinced that the improper impeachment of Wells and Gordon tainted appellant's trial at most to such a marginal extent

[8]*Kotteakos* continues to provide the standard for judging nonconstitutional errors in this circuit. See, *e.g., United States v. Martinez,* 536 F.2d 1107 (5th Cir. 1976); *United States v. Jennings,* 527 F.2d 862 (5th Cir. 1976); *United States v. Harbolt,* 491 F.2d 78 (5th Cir. 1974); *United States v. Resnick,* 488 F.2d 1165 (5th Cir. 1974).

that the judgment must be affirmed under the above standard.

The government presented an extremely powerful, if circumstantial, case against the appellant. Largely unchallenged documentary evidence established that appellant made it a common practice to bill identical expenses, chiefly travel and entertainment, to each of local 666, local 478, the District Council, and the ILU, and to obtain full reimbursement from each. The vast majority of the reimbursement checks were cashed by Rubin at a savings and loan association; a few were deposited in an account Rubin maintained there. Similar documentation established that when attending a conference on behalf of the various employee welfare benefit plans of which he was a trustee, Rubin would obtain from each organization the amount it had set to cover an individual's full expenses at the conference.

None of the entities to which appellant addressed his duplicate billing had any notice of his reimbursement from other sources. Indeed, the government established that in local 666, the constitution of which required two signatures on all checks from the union treasury, Secretary-Treasurer Henry signed all checks in blank. Appellant, president and business manager of 666, supplied the payee and amount.

Appellant did not deny the fact of multiple billing. Rather, he attempted to show that his actions were unaccompanied by the intent requisite to convictions under 29 U.S.C. § 501(c).[9] Rubin claimed that organizing drives and the maintenance of relationships with

[9]On the contents of that intent requirement, *see United States v. Ottley,* 509 F.2d 667 (2d Cir. 1975); *United States v. Silverman,* 430 F.2d 106 (2d Cir. 1970).

management required him to keep a large cash fund at the ready. He testified that in a campagin to unionize laborers at a particular plant, he had frequently had to give a subordinate organizer as much as several thousand dollars cash to compensate workers helping in the drive and to entertain others. Checks were too slow and cumbersome in the brief duration of a campaign; laborers traditionally preferred cash. Cash would frequently be required by the establishment at which, over lunch or a drink, prospective members were encouraged to join. Cash was sometimes necessary to cover workers' emergency needs during a strike. Finally, cash was an important part of appellant's efforts to entertain management. Rubin testified of the importance of maintaining an "image of affluence." He related that he attempted always to carry four or five thousand dollars in cash, with which he could pick up large bills.

Appellant explained that he had employed the multiple billing practice to generate this cash. He testified that local 666 and the District Council had authorized him to make whatever expenditures from the union treasury he deemed in the interest of the organization. He had concluded that this authorization legitimized the multiple billing and the use of the cash fund for general organizing and maintenance of relations with management. As for the employee welfare benefit plans, Rubin testified that a lawyer had advised him that it was legal to receive conference expense advances from more than one entity, so long as any excess over actual expenses was spent on union business.

On cross-examination, Rubin testified that he maintained no records of the cash fund or disbursements from it. Moreover, the government's evidence contained

material responsive to appellant's story. The annual reports of each relevant entity, required by the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531, showed the amount of expenses that entity had reimbursed, but the cash fund and the disbursements from it never appeared. The government introduced evidence tending to show that an audit of any individual organization involved would not have disclosed the multiple reimbursements. Finally, the government documented a multitude of expenditures not included in the indictment that appellant had not covered out of any cash fund, but for which he had, instead, received reimbursement.

Suffice it to say that after appellant told his story the government's case remained extremely strong. According to his own testimony, appellant had the legitimate authority to draw a check on one of the union treasuries whenever organizing or entertaining expenses created the need for cash. Instead he generated cash by copying assorted bills and charging them two to four times over to various entities.

The witnesses called by appellant corroborated only one aspect of his story: the fact of numerous and large cash expenditures by Rubin, either as disbursements to subordinates for organizing or as payments by himself in entertaining. Including Wells and Gordon, eight witnesses testified to this effect, six from the union ranks and two contractors.

Larry Feder, an organizer for local 666, was perhaps the chief union witness. He testified that over the relevant years he had received between $35,000 and $40,000 cash from Rubin for organizing expenses. Additionally, he had witnessed Rubin spend large amounts of cash at dinners with management.

The government attacked Feder's credibility in numerous ways. As with all the organizers who testified, the government established the large salary received by Feder at appellant's direction. Feder admitted he had kept no records of any of the thousands of dollars he claimed to have received. Most importantly, the government offered the testimony of Department of Labor Agent William Gamble, who had interrogated Feder regarding the money he received as an organizer, specifically inquiring how his expenses were paid. Feder had told Gamble that expenses were reimbursed upon the submission of receipts. No mention was made of ever receiving cash from appellant. The prosecutor repeatedly emphasized Feder's statement to Gamble in his closing argument.

Jake Wright, a district council organizer, offered similar testimony, accounting for approximately $6,000 cash received from appellant. On cross-examination, Wright first testified that he thought he had told Agent Gamble about the cash payment in response to questions Gamble asked about organizing expenses. A review of his statement to Gamble refreshed his recollection to the contrary. Moreover, the government brought out Wright's grand jury testimony that he did not know what Rubin did in his union offices. Again, the prosecutor emphasized this impeachment material in argument.

Besides Wells and Gordon, the defense called two other union witnesses of relatively minor importance. A laborer from local 478 testified that he had received $2400 cash from appellant for work in an organizing campaign. A shop steward from local 478 testified that he had received $1,000 cash from Jake Wright in each of two campaigns.

Wells and Gordon each accounted for around $13,000 cash received from Rubin for organizing expenses, though Wells testified at greater length and in more detail. Apart from any effect of the impeachment by grand jury silence, Wells's testimony at many points lacked credibility in its own right. On direct he attempted to explain the absence of receipts for his organizing expense. Wells testified that when an organizer takes a recruit out to lunch, he cannot impress the prospect if he has to obtain a receipt. Wells further testified that he did sometimes manage to collect receipts, but that these were frequently lost when his wife washed his clothes. The prosecutor pointed to Wells's lack of credibility as well as his grand jury silence in argument. Apart from Gordon's grand jury silence, the government attacked his testimony only as it did that of each organizer—with the facts that appellant controlled his salary and that Gordon had kept no records of the cash he received from Rubin.

In short, the defense put on four union witnesses of significance in the effort to corroborate the fact of union related cash expenditures by appellant. With the possible exception of Gordon, who testified most briefly of the four, each faced sharp attack from the government apart from the impeachment use of Wells's and Gordon's grand jury silence. The prosecutor emphasized those attacks in closing argument at least as forcefully as the references to the silence of Wells and Gordon.[10]

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[10]We reject the claim that the prosecution's argument tended to lump all the defense witnesses under the refusal of Wells and Gordon to testify. When read in context, each of the references to their grand jury silence is accompanied by distinct references to the statements given to Agent Gamble by Feder and Wright that were inconsistent with their trial testimony and to Wright's inconsistent statement to the grand jury.

[9] The jury's verdict rests on either of two lines of reasoning. Given the strength of the government's case, the jury could well have believed the defense witnesses' testimony that Rubin made many large cash payments related to union activities and still have concluded that Rubin knew the multiple reimbursements were unauthorized or that the multiple reimbursements were unrelated to any such cash payments, sufficient for them to find violations of 29 U.S.C. § 501(c). That Rubin was a good union man is no defense to the requirement of a modicum of accountability for moneys expended for the union. The embezzlement statute imposes no penny pinching requirements, but neither does it afford blanket exculpation for open-handedness and benignity in the spending process. The jury could easily have concluded that union activities require big spending and that Rubin was a free spender, but still have believed that he knew accumulating funds by duplicate billing was unauthorized and that the funds so accumulated were not benignly employed. In that case the improper impeachment obviously had no impact.

Alternatively, the jury may have disbelieved all or part of the testimony regarding Rubin's cash expenditures. We find nothing in the cross-examination or argument regarding the grand jury silence of Gordon and Wells that would have any significant tendency to impugn the testimony of Feder and Wright. To the extent the jury disbelieved the latter pair, we are confident they did so on the basis of the substantial proper impeachment of the two.

Thus it appears that at most the improper impeachment tended to discredit Gordon's brief comments and

Wells's testimony, not without substantial independent implausibility. The effect of that tendency must have been slight. There was no defensive attempt to match the total allegedly embezzled sums to the expenditures related by the witnesses. Each individual witness did not occupy a linchpin position. Thus the possibility that the jury believed Feder and Wright but rejected the defense because of the improper impeachment of Gordon and Wells is remote. Moreover, given the sum of Gordon's and Wells's testimony, the possibility is equally slim that the jury disbelieved the remaining defense witnesses but would have accepted the defense absent the improper impeachment. In light of the balance of the evidence and the place of Wells and Gordon in the defensive lineup, we cannot conclude that the erroneous impeachment use of their refusal to testify before the grand jury was prejudicial under the *Kotteakos* standard.[11] Were that balance any different or the testimony of Wells and Gordon of any more apparent importance, different considerations would obtain. As this record stands, however, we harbor nothing approaching a "grave doubt" that the error did not exert a substantial influence on the jury. We think it clear that the error was harmless.

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[11]Appellant does not and could not claim that the single explicit reference during Wells's testimony to the privilege against self-incrimination prejudiced him by creating a substantive inference of Wells's guilt that transferred to the defendant. *See United States v. Natale, supra; United States v. Glasser, supra.* That reference, though volunteered by Wells, was certainly foreseeable by the prosecutor. The government cannot escape blame for any prejudice that might have arisen. Nevertheless it is clear that no such prejudice did arise. The government at trial consistently showed that the subordinates knew nothing of appellant's financial machinations; there was in the circumstances no suggestion to the jury of the witnesses' involvement in criminal behavior related to the charge against appellant.

II. Other Claims

We may readily dispose of appellant's remaining attacks on the validity of his conviction.

A. Failure to Record Grand Jury Proceedings

Appellant complains that the prosecutor's comments to the grand jury were not recorded. The trial court denied motions to require recording of the grand jury proceedings and to dismiss the indictment for failure to do so. The government did record the testimony of witnesses before the grand jury.

[10] The far better practice is to record grand jury proceedings, including the comments of the prosecutor. *See United States v. Peden,* 472 F.2d 583 (2d Cir. 1972). Nevertheless there remains no constitutional or statutory requirement of recording. *See United States v. Flanagan,* 445 F.2d 263 (5th Cir. 1971), *United States v. Howard,* 433 F.2d 1 (5th Cir. 1970). Accordingly, the failure to do so, standing alone, provides no predicate for reversal.

[11] A defendant may nevertheless obtain what grand jury records do exist or receive a hearing on what has transpired in the grand jury room upon a showing of need. *See United States v. Tucker,* 526 F.2d 279, 282 (5th Cir. 1976); *United States v. Howard, supra,* 433 F.2d at 2-3. That showing, however, must include more than unsubstantiated, speculative assertions of improprieties in the proceedings.

[12] Appellant's only allegation of prosecutorial misconduct in the grand jury proceedings themselves is that the prosecutor concentrated his questioning of several witnesses on their conversations with their own or appellant's lawyers. From this appellant argues that

the prosecutor improperly misinformed the grand jury that Rubin was obstructing the investigation. Assuming a defendant's substantive right to dismiss an indictment based on prosecutorial misconduct so flagrant as to deny fundamental fairness, we cannot regard appellant's speculation as a sufficient demonstration of need to require reversal for the district court's failure to require recording, to order production of existing grand jury records, or to conduct a hearing inquiring into the prosecutor's action.

B. Electronic Surveillance Claim

[13, 14] Appellant also claims that the trial court improperly handled his suggestion that government agents had conducted illegal electronic surveillance of his office. Under 18 U.S.C. § 3504(a)(1), a defendant by asserting a claim of such surveillance requires the government to affirm or deny its occurrence.[12]

This court has made clear that a "mere assertion" by a criminal defendant claiming surveillance of himself is sufficient without supporting evidence to trigger the government's obligation to affirm or deny. *See United States v. Tucker,* 526 F.2d 279, 282 (5th Cir. 1976). However, we have also announced adherence to the requirement that the assertion of surveillance be a "positive statement that unlawful surveillance has taken place." *Id.*[13] An allegation that it "may" have occurred will not suffice.

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[12] 18 U.S.C. § 3504(a)(1) reads in full as follows:

> Upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act.

[13] There is no requirement that the allegation be sworn.

Appellant failed to meet this requirement. Like the claimant in *Tucker,* he filed a motion alleging only a suspicion of surveillance, that he had "reason to believe" someone had eavesdropped on conversations in his office. The statutory provision for discovery of illegal surveillance is a salutary one; it is not too much, however, to require a positive representation of such surveillance before the government's obligation to respond arises. In any event that requirement is already the law of this circuit.

[15] In passing we caution the government against further use of the form of limited response it did offer below. While an unadorned denial of illegal surveillance may suffice to meet the barest, most general accusation, that response must unequivocally deny the occurrence of illegal surveillance, apart from any question whether evidence against the defendant was obtained thereby. While such a general denial may have been the intended import of the government's statement here that "no illegal activities were used to gain evidence concerning Bernard Rubin", the ambiguity created by the negative pregnant would render this response inadequate.

C. Racketeering Instruction

[16] Lastly Rubin objects to the district court's instructions defining the racketeering offense set out in 18 U.S.C. § 1962(c). That section of the Organized Crime Control Act of 1970 provides:

> It shall be unlawful for any person employed by . . . any enterprise engaged in . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

The statute defines "racketeering activity" to include the offenses of embezzlement from union funds and employee welfare benefits plans. 18 U.S.C. § 1961(1). A "pattern of racketeering activity" comprehends two or more such offenses within a ten year period. 18 U.S.C. § 1961(5).

Appellant's concern is the requirement of § 1962(c) that the offender conduct or participate in the conduct of an enterprise's affairs, here the affairs of the unions and the benefit plans, *through* a pattern of racketeering activity. He contends that the statute requires the government to prove that he acquired or maintained his labor union control by virtue of acts of embezzlement, or that those acts somehow furthered his ability to participate in or conduct the affairs of the enterprises. The government maintains that to convict under the racketeering statute the jury need only have found two offenses during the course of appellant's employment with one of the organizations.

Then District Judge Fay steered a middle course. Tracking the language of the statute, he instructed the jury that the government had to prove that "through" the two or more offenses, the defendant participated in the conduct of affairs of the various union entities. Judge Fay rejected appellant's only suggestion for incorporating his reading of the statute into the instructions, which was to include a statement that "through" means "by means of". The judge also rejected an instruction proposed by the government along the lines of its interpretation of § 1962(c).

The language of § 1962(c) is less than pellucid, and appellant's attempt to illumine has appeal. The "Statement of Findings and Purpose" that introduces

the Organized Crime Control Act of 1970 contains some suggestion that Congress primarily concerned itself with the use of racketeering activity to gain and maintain positions in legitimate business and labor organizations. *See* Pub. L. No. 91-452, 84 Stat. 922 (1970), *reprinted in* [1970] U.S.Code Cong. and Ad. News 1073. The Ninth Circuit has emphasized the importance to a § 1962(c) prosecution of establishing a substantial nexus between the prohibited activity and the conduct of the enterprise's affairs in *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975). On the other hand, one court has found the statute satisfied by two or more offenses committed in the course of employment with the relevant enterprises, so long as the offenses are themselves related. *See United States v. Stofsky*, 409 F.Supp. 609 (S.D.N.Y.1973), *aff'd.* 527 F.2d 237 (2d Cir. 1975).

We find it unnecessary to attempt definitive resolution of this issue. Assuming some required relationship between the proscribed acts and the maintenance of union position, we find the trial court's instructions sufficient to convey that meaning. At least we cannot find reversible error in the failure to add the proffered words "by means of". Appellant's definition might have emphasized the nexus, but would have added little content to the definition of so common a word as "through." The evidence was certainly sufficient to support a conclusion that appellant's embezzled funds served his position in the union organizations.

[17] Having found no prejudicial error in the proceedings that culminated in appellant's conviction, we affirm that judgment. Appellant has, however, raised a substantial objection to one aspect of his sentence, to which we now turn.[14]

III. Forfeiture of Union Offices

[18-20] Upon appellant's conviction of the racketeering charges, the district court issued an order pursuant to 18 U.S.C. § 1963(a) that Rubin forfeit his offices in the various unions and employee welfare benefit plans. Additionally, the court ordered forfeiture in perpetuity of the right to hold any such office. Appellant challenges these orders as beyond the intended reach of the forfeiture sanction.

Part of the Organized Crime Control Act of 1970, (hereinafter the "Act"), 18 U.S.C. § 1963(a) provides:

> Whoever violates any provision of section 1962 . . . shall forfeit to the United States . . . (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or par-

[14]Appellant raised four other claims of error. We reject as meritless the claim relating to discovery of an Internal Revenue Service file and that relating to the presence before the grand jury of Department of Justice Organized Crime and Racketeering Strike Force attorneys. Two claims, one asserting that the trial court improperly excluded certain defense evidence as hearsay and one challenging the court's instructions on the fiduciary duties of a union official under 29 U.S.C. § 501(a), were raised pertinent to the embezzlement counts that charged unlawful salary increases. We need not reach these claims because of the operation of the concurrent sentence doctrine.

ticipated in the conduct of, in violation of section 1962.

The question before us is whether appellant's various offices are "interests", "securities", "claims", or "property or contractual right of any kind", within the meaning of § 1963(a). Given Congress' clear intent to use every possible means to separate those found guilty of racketeering activity and their confederates from the enterprises they had conducted through such activity, we find no basis in language or policy for excluding those offices appellant presently holds from the reach of the forfeiture provision. The terms of that provision, however, cannot reach appellant's right to seek and reattain such offices. That right, moreover, is independently regulated by provisions of the federal labor statutes. Accordingly, we modify the forfeiture order entered below, restricting its application to appellant's incumbent status in the enumerated offices.

As a criminal statute, § 1963 "must be strictly construed, and any ambiguity must be resolved in favor of lenity." *United States v. Enmons,* 410 U.S. 396, 411, 93 S.Ct. 1007, 1015, 35 L.Ed.2d 379 (1973). This canon has particular application to forfeiture statutes. *See Baca v. Commissioner,* 326 F.2d 189 (5th Cir. 1964). Indeed, the forfeiture of a portion of an individual's property as a consequence of a criminal conviction was unknown to the federal criminal law until the passage of § 1963.[15] Such a penal foray bespeaks a need for circumspection.

[15]Unlike *in rem* forfeiture proceedings against contraband or articles put to unlawful use, § 1963 operates against the person of the defendant and includes within the punishment for his crime forfeiture of a portion of his estate. Such a provision, while known to the common law of England and the colonies, is foreign to the federal criminal law. The 91st Congress recognized that, in passing § 1963, it was partially repealing a statute passed by the First Congress, which in its present form provides that: "No conviction or judgment shall work corruption of blood or forfeiture of estate." 18 U.S.C. § 3563. *See United States v. Mandel,* 408 F.Supp. 679 (D.Md. 1976); S.Rep. 91-617, 91st Cong., 1st Sess 79-80 (1969), hereinafter S.Rep.); 116 Cong.Rec. 35205, 35208 (remarks of Rep. Mirka, Rep. Ryan).

Besides the unprecedented nature of the forfeiture sanction, the uncertain reach of "patterns of racketeering activity"—the gravamen of a § 1962 offense—requires interpretive caution in this area. See Part II. A., *supra.* While addressed to organized crime, the Act is not limited in application to members of that undertaking. *See United States v. Campanale, supra.* Indeed, while we readily conclude appellant was properly convicted under the racketeering provisions we intend to intimate no finding or sense of any kind that he is or has been affiliated with what might be labeled organized crime.

That circumspection nevertheless must give fair heed to the clear congressional intent to increase the variety and strength of federal prosecutorial weapons designed to root out and keep out the influence of organized crime in legitimate business and labor organizations. Congress found the traditional criminal sanctions of imprisonment and fine wanting in the effort against infiltration by organized crime. Incarcerating individuals could remove them from the operation of victimized organizations. So long as those individuals retained or could transfer economic leverage over the organizations, however, removing them to prison often resulted only in the rule by proxy or in the promotion of junior members of organized crime. As the Senate Judiciary Committee stated, "What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat." S.Rep. at 78 (1969); *see also Measures Relating to Organized Crime: Hearings on S.30 and Related Pro-*

posals Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, 91st Cong., 1st Sess. 112 (1969) (statement of Attorney General) (hereinafter "Senate Hearings"); *Organized Crime Control: Hearings on S.30 and Related Proposals Before Subcommittee No. 5 of the House Judiciary Committee,* 91st Cong.2d Sess. 107 (Statement of Sen. McClellan) (hereinafter "House Hearings"); 116 Cong. Rec. 35193 (1970) (remarks of Rep. Sisk).

The criminal forfeiture provision is one attempt to destroy that economic base. Thus Congress clearly contemplated forfeiture of any ownership or investment type of interest a defendant might hold in an organization he had conducted through a pattern of racketeering activity. It is just such an interest that would not otherwise terminate with incarceration and would enable a defendant and/or his confederates to maintain control of an organization.

The question is whether that language of § 1963(a) —interest, security, claim, property or contract right— should be extended beyond such financial interests to elective or appointive management positions such as those held by appellant. The scope of the statute is indeed without precise boundaries.[16] Appellant's man-

[16]Judge Fay below explicitly noted the ambiguity in the statute:

> I would want the record to show that this is apparently a gray area. It's difficult to say that the statute is precise or specific, because when it talks in terms of forfeiting something to the Government, you would ordinarily think of money or property, or something of that sort. (R. 821-22).

agement positions do not present the same problem regarding perpetuation of control that ownership interests create.

Nonetheless we conclude that appellant's entitlement under the organic documents of the various entities to serve the remainder of his terms of office falls within the language of the statute. So far as the record demonstrates, his rights under the charter and constitutions of the various organizations to serve out his terms of office are as contractual in nature as an employee's rights under an employment agreement for a term of years, terminable for cause. The terms of the forfeiture provision reach beyond any narrow definition of capital investment, embracing "property or contractual right of any kind." The Senate Judiciary Committee wrote that the language "is designed to accomplish a forfeiture of any interest of any type in the enterprise . . . ." S.Rep. at 79. While such open-ended intent cannot legitimate extension of the sanction beyond the statute's plain terms, limited to their reasonably foreseeable scope, neither can it be disregarded.

[21] Construing § 1963 to encompass the positions appellant holds also accords with congressional intent. First, retention of a management position, even *in absentia,* could permit a defendant convicted under the racketeering provisions to continue to exert an influence over an enterprise. Moreover, although Congress' primary concern in enacting the forfeiture pro-

vision was eradicating organized crime's economic base, which more readily translates into ownership interests, it also intended forfeiture fully to serve the broader goal of legally separating persons who run an enterprise through the defined racketeering activity from the enterprise itself. *See* S.Rep. at 79.[17] Although applying § 1963 to appellant's offices may serve only this broader goal and be unrelated to eliminating self-perpetuating economic power, there remains no reason to conclude that those offices lie outside the sanction's reach.

[22] In short, a reasonably cautious interpretation of the language of the forfeiture provision brings within its reach the right under an organization's charter to serve out a specified term in an elective or appointive management position of substantial influence. Such an interpretation serves the policies identified by Congress in enacting the statute. Because both those conditions are satisfied, the order that appellant forfeit his present positions in the various union entities is proper.[18]

The forfeiture sanction, however, can have no proper effect on appellant's right in the future to seek union office, including those offices he must now give up. That right to run for and hold office is not something appellant as an individual has acquired or maintained with respect to the various union entities; it is the

[17]Senator McClellan, a sponsor of the provision, explained to the House subcommittee that the forefeiture sanction would "punish the criminal appropriately by forfeiting to the government his ill-acquired interests . . . and directly aid the business community by expelling him from the legitimate business he abused." House Hearings at 107.

[18]That those offices cannot be meaningfully transferred to the United States is of no moment. 18 U.S.C. § 1963(c) provides that a forfeited interest not exercisable by the United States shall terminate.

same right possessed by all members of all unions. In no sense a contractual or property right held by the individual against a union, the right to seek union office is rather guaranteed by federal statute. *See* 29 U.S.C. 481(e). The language of the new penal statute does not extend to such a right.

Moreover, the forfeiture provision itself contains no prophylactic ban on reacquisition of the same interest as that forfeited. Nothing in § 1963 prevents an individual from investing funds in an enterprise in which he has had to forfeit a previous investment. Such an interpretation does not rob the sanction of its deterrent effect, which results from the heavy financial loss that can be visited by a forfeiture order. *See* Senate Hearings at 388 (statement of Assistant Attorney General Will Wilson). Even in the context of a management position, forfeiture without restriction on reentry removes from the convicted defendant the advantages of incumbency.

Finally, restricting the operation of the sanction to presently-held interests is supported by the fact that Congress specifically attended to the problem of reacquisition in the civil remedies of § 1964. Included among those remedies are injunctions against a defendant conducting in the future the same type of enterprise he conducted through racketeering activity in the past. That powerful measure was rightfully addressed to the district court's equitable discretion and not made a part of the forfeiture sanction that attaches automatically upon conviction under § 1962.

The analysis thus far would apply to a distinction between any presently-held interest and the right to regain that interest. Limiting forfeiture to the former,

makes particular sense in the context before us, moreover, because labor code provisions independently regulate appellant's right to seek union office in the future.

Assuming appellant's embezzlement convictions become final, it will be unlawful for him to serve as an officer of a labor organization or a trustee of an employee welfare benefit plan. 29 U.S.C. §§ 504, 1111. That ban continues for five years following the conclusion of imprisonment, subject to the discretion of the Board of Parole to lift the restraint. Nowhere in the legislative history of the Organized Crime Control Act of 1970 does there appear a reference to this restraint on the right to seek union office, which attaches upon conviction of many of the offenses included in the 1970 Act's definition of racketeering activity.

We do not read the criminal forfeiture provision as imposing a permanent ban on reacquisition of any covered interest. The statute creates no rule of perpetuity. It has a limited temporal reach with which we have no right, no power, to tamper. In any case we cannot find in § 1963 any authority to impose the radical measure of a lifetime ban on holding union office when that statute was passed completely without regard to the five year ban in existence at the time of enactment. Insofar as the district court ordered appellant to forfeit his right to seek and hold office in the labor organizations and employee welfare benefit plans, that order must be reversed. Appellant's rights in that regard are committed to the operation of 29 U.S.C. §§ 504, 1111.

CONCLUSION

The judgment of conviction is AFFIRMED. The order of forfeiture is AFFIRMED AS MODIFIED.

APPENDIX B.

United States Court of Appeals
Fifth Circuit
Office of the Clerk
Edward W. Wadsworth, Clerk
Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

November 2, 1977

TO ALL PARTIES LISTED BELOW:
NO. 76-1143—U.S.A. v. BERNARD G. RUBIN

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
By /s/ Brenda M. Hauck
Deputy Clerk

**on behalf of appellant, Bernard G. Rubin,

cc: Mr. Richard L. Rosenfield
Mr. Ivan Michael Schaeffer

APPENDIX C.

In the United States Court of Appeals, for the Fifth Circuit.

United States of America, Plaintiff-Appellee, versus Bernard G. Rubin, Defendant-Appellant. No. 76-1143.

Appeal from the United States District Court
for the Southern District of Florida

Filed: Nov. 16, 1977.

ORDER:

( ) The motion of ..... for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

(√) The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including December 2, 1977, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ Irving L. Goldberg
UNITED STATES CIRCUIT JUDGE

APPENDIX D.

Miami, Florida
December 23, 1974

Honorable C. Clyde Atkins
Judge, United States District Court
P.O. Box 013009
Miami, Florida 33101

Dear Judge Atkins:

Although the matter of the Grand Jury Duces Tecum Subpoena for Florida Administrators, Inc. is now moot pursuant to this Court's recent ruling, I am taking this opportunity to write to you and correct the impressions created by the affidavit of John H. Schulte (see attachment A) in reference to the conduct of the Government in this matter. Since I did not receive the affidavit until the morning of the hearing, I have not had an opportunity to respond. Although the matter, as I've said is moot, I do not feel that the Court should be left with only a limited view of the facts as stated in the Schulte affidavit.

Sometime in November of 1974, Compliance Officer William Gamble interviewed Mr. Grossman, President of Florida Administrators, Inc., and Abe Jordan also of Florida Administrators, Inc., relative to various labor union trust funds administered by Florida Administrators, Inc. This interview was in reference to records which would identify any unauthorized disbursements from said funds to one Bernard Rubin, a union official of various Laborers Unions in south Florida. At this time Mr. Gamble was told that Florida Administrators, Inc. would be happy to aid the Government and for Mr. Gamble to merely write a letter for the material

and Florida Administrators, Inc. would give the Government anything it requested. Later pursuant to a telephone call between Mr. Grossman and Mr. Gamble, it was decided to subpoena the records before the Grand Jury. Mr. Gamble was told by Mr. Grossman to make the subpoena out to Abe Jordan for said records. No one objected to the amount or type of records requested up to this point.

As a result of these preliminary conversations a subpoena was made out to Abe Jordan calling for the records that had been discussed. (See attachment B) Two agents served Mr. Jordan with the subpoena. Mr. Jordan was very cordial and cooperative at this time. He stated in reference to the subpoena, that that was the correct way to obtain the records from Florida Administrators, Inc. and that he was the correct person to serve. He did not object in anyway to the scope of the subpoena or to his being named in the subpoena. His only comment at the time was that before he complied he would have to await the outcome of a meeting between Mr. Grossman and Mr. Seymour Gopman an attorney for various Laborer's Unions.

Approximately one week before the subpoena was returnable Mr. Jordan called the undersigned. Mr. Jordan asked whether he was to turn the records over to the labor agents or to come before the Grand Jury. I told him that he must appear before the Grand Jury with the records. He stated at that time that he was technically not the custodian of the records. I then asked him who was and who could comply with the subpoena. Mr. Jordan quickly reassured me that even though he was not technically the custodian of the records, that he was the proper person to sub-

poena and that he would gladly comply with the subpoena. He was very cordial and did not indicate in anyway that the subpoena would call for any great deal of work. In fact his tone and conversation indicated to me that he either presently had the records in question or that they were easily obtainable and available.

On the day the subpoena was returnable, I received a call from John Schulte. He stated that he represented Florida Administrators, Inc. He further stated that Florida Administrators, Inc. had no objection to complying with the subpoena but that a "client" of Florida Administrators, Inc. informed Florida Administrators that if they complied willingly with the subpoena Florida Administrators would be sued and would possibly lose business. He further stated that this put Florida Administrators, Inc. in an unenviable position and that his concern was protecting Florida Administrators, Inc. As a result, he stated, he would have to file a Motion to Quash the subpoena of Abe Jordan since Mr. Jordan was not technically the custodian of records of Florida Administrators, Inc.

I was very surprised at this call because Florida Administrators, Inc. had been very cooperative from the first moment the Government approached them. As a matter of fact they were the only entity having anything to do with the Laborer's Unions and Bernard Rubin that was cooperative. I told Mr. Schulte that it was pretty sad when the subject of a Grand Jury investigation could interfere with witnesses bringing records to the Grand Jury. I also told him that, in my opinion the fact that a client of Florida Administrators, Inc. might sue them or take away business, was

not a sufficient reason for not complying with the subpoena.

Mr. Schulte agreed with me, but stated that his only interest was in protecting Florida Administrators, Inc. He stated that he would file a Motion to Quash. He asked me to excuse Mr. Jordan until it was argued. I stated that I could not excuse him, but instead of wasting his time waiting at the Grand Jury until we went before a Judge, just to make himself available. I then asked if the records subpoenaed were available should a Judge rule in the Government's favor. Mr. Schulte stated that they were. I informed Mr. Schulte that I was surprised that he would allege as the grounds for his Motion to Quash that Mr. Jordan was not the custodian of Florida Administrators, Inc. I told him that Mr. Grossman and Mr. Jordan themselves had directed federal agents to make out the subpoena to Mr. Jordan.

As a result a hearing was held before this Court wherein the Court ordered both parties to get together to attempt to find a proper custodian and to narrow the subject matter of the subpoena so that Florida Administrators, Inc. could determine exactly what records the Government wanted (this, by the way, was the first time anyone speaking on behalf of Florida Administrators, Inc., had stated that they could not comply because the subpoena was not specific enough).

I could not confer with Mr. Schulte on December 10, 1974, as this Court well knows, because of my obligations to the Grand Jury. As a result I told Agent Gamble to call Mr. Schulte to find out who he wanted the Government to make out the subpoena to. I specifically told Mr. Gamble not to discuss the

legality of the subpoena in any respect, but merely to determine who was the proper custodian of records. Mr. Schulte refused to name a proper custodian.

During the course of the conversation Mr. Schulte again alluded to the "client" who did not want Florida Administrators to comply with the subpoena. Mr. Schulte stated that "they" informed Florida Administrators, Inc. that Florida Administrators, Inc. should contest the subpoena or that there might be a civil liability on the part of Florida Administrators, Inc. Mr. Gamble responded that that sounded like obstruction of justice —*not on the part of Florida Administrators, Inc.*— but on the part of that person who told Florida Administrators, Inc. not to comply when they were apparently willing to do so. Mr. Gamble asked Mr. Schulte how "they" even knew Florida Administrators, Inc. had been served with a subpoena. To this there was no response. Although no specific names were mentioned Mr. Gamble informed me that it was clear from the conversation that "they" referred to Mr. Bernard Rubin and his attorneys (since the subpoena requests information about disbursements to Mr. Rubin, this is only logical). Several agents who were in the room with Mr. Gamble when the call was made have informed me that Mr. Gamble was extremely polite and did not "get upset" or "make any accusations about Mr. Schulte or Florida Administrators, Inc."

On December 11, 1974, I called Mr. Schulte about the form of the subpoena. He stated that he would like us to name each trust fund by its proper name and number. I told him that we would do so in the case of those we knew of by reviewing records and testimony we had already received. I did, however,

inform Mr. Schulte that other than witnesses saying that it was so, we had no way of knowing exactly what fund Florida Administrators, Inc. administered for the Laborer's Unions. After discussing the matter further for sometime, Mr. Schulte and myself tentatively agreed on items A-G and 1-7 in the subpoena (see attachment C). Mr. Schulte then informed me that he could not agree to item II which called for a list of trust funds administered by Florida Administrators, Inc. I again informed Mr. Schulte that we had no way of knowing whether there were trust funds of various Laborer's Local Unions other than those previously mentioned in items A-G and 1-7. I stated that it was important to the Government to determine whether Mr. Rubin had taken any trust funds of a Union and that if there were other Laborer's trust funds other than A-G and 1-7, that the only way we could find that out would be to see a list of those funds administered by Florida Administrators, Inc. and pick those out that had anything to do with any Laborer's Union. Mr. Schulte refused to supply me with such a list. I then requested the name of a proper custodian. Mr. Schulte asked me how long I had been making out subpoenas and to look it up somewhere or make it out to "officers and custodians". I told Mr. Schulte that I wanted to serve a specific person and would he please name one. He said that if the time ever came for serving a subpoena someone would respond. He still refused to name any person.

At this time Mr. Schulte again informed me that the "client" of Florida Administrators, Inc., did not want them to comply with the subpoena although Florida Administrators, Inc., had no particular objection.

I again informed him that this was not a proper reason to file a Motion to Quash and that this seemed like interference with the Grand Jury.

I again informed Mr. Schulte that although we could (and did) specify the labor unions by name and number where we could, we had no possible way of knowing which trust funds they administered for any Laborer's unions (except witnesses who have informed the Government that Florida Administrators, Inc. administered most of the trust funds for all of the Laborer's unions). I again asked for a list so that we could examine the list and subpoena just those funds involving Laborer's unions. Mr. Schulte refused to give us a list and stated that if we kept Item II on the subpoena he would file a Motion to Quash. I asked him if this included items A-G and 1-7 that we already had tentatively agreed on. He stated that it would include everything we asked for.

Subsequently, Mr. Schulte filed his Second Motion to Quash on the second subpoena which contained an affidavit about certain Government conduct.

Although the matter is now moot I thought it important that the Court be informed of exactly what action the Government took and why they did so. In my opinion the Government acted properly in the face of obvious outside interference. A member of the bar should be more responsible when he files an affidavit that could affect the career of a Government agent. In my opinion the Government agents in this particular investigation have acted entirely properly and circumspectly in the face of serious efforts by the subject of the investigation to frustrate that investigation, not only with respect to Florida Administrators, Inc.,

but in many other aspects that this Court is aware of.

Respectfully,

/s/ Marty Steinberg
MARTY STEINBERG,
Special Attorney
U. S. Department of Justice

cc: John Schulte, Esq.
1301 DuPont Building
Miami, Florida 33131

APPENDIX E.

Flax and Rosenfield
Attorneys at Law
1880 Century Park East
Suite 1600
Century City
Los Angeles, California 90067
Telephones (213) 277-2411, (213) 879-3841

February 10, 1975

Honorable C. Clyde Atkins
Judge, United States District Court
P.O. Box 013009
Miami, Florida 33101

Dear Judge Atkins:

My law partner Larry Flax and I are retained attorneys for Bernard Rubin, a prominent labor official who is currently the subject of an investigation being conducted by the United States Department of Justice Organized Crime and Racketeering Strike Force in your district.

In early January, during my presence in Florida for the purpose of representing Mr. Rubin at his appear-

ance before the Federal Grand Jury on January 7, 1975, I was astonished and shocked to learn that Mr. Marty Steinberg, Special Attorney for the Strike Force had addressed an *ex parte* letter to your Honor which accused Bernard Rubin and his attorneys of obstruction of justice in the pending investigation. I have acquired a copy of this letter; my concern occupies several discrete levels.

Both my partner and I are young lawyers. Yet, we are not unfamiliar with Federal criminal practice. Larry Flax served as Assistant United States Attorney and Assistant Chief of the Criminal Division in the United States Attorney's Office for the Central District of California from 1968 to 1972. From 1969 to 1973 I served with the Appellate Section of the Criminal Division in Washington D.C., then later with the Special Prosecution Section, Criminal Division of the United States Attorney's Office in Los Angeles.

In his letter to your Honor, Mr. Steinberg states on page four:

> "During the course of the conversation Mr. Schulte again alluded to the "client" who did not want Florida Administrators to comply with the subpoena. Mr. Schulte stated that "they" informed Florida Administrators, Inc. that Florida Administrators, Inc. should contest the subpoena or that there might be a civil liability on the part of Florida Administrators, Inc. Mr. Gamble responded that that sounded like obstruction of justice—*not on the part of Florida Administrators, Inc.*—but on the part of that person who told Florida Administrators, Inc. not to comply when they were apparently willing to do so. Mr. Gamble

> asked Mr. Schulte how "they" even knew Florida Administrators, Inc. had been served with a subpoena. To this there was no response. Although no specific names were mentioned Mr. Gamble informed me that it was clear from the conversation that "they" referred to Mr. Bernard Rubin and his attorneys (since the subpoena requests information about disbursements to Mr. Rubin, this is only logical).

Later Mr. Steinberg concludes:

> "In my opinion the Government agents in this particular investigation have acted entirely properly and circumspectly in the face of serious efforts by the subject of the investigation to frustrate that investigation not only with respect to Florida Administrators, Inc., but in many other aspects that this Court is aware of."

My first inquiry is how a Federal Prosecutor could deem it ethically proper to address a letter to a Federal Judge which accuses the subject of a criminal investigation and his attorneys of obstruction of justice, then not serve a copy of that inflammatory statement upon the subject or his attorney. Had it not been for the fact that there is communication between some of the subpoenaed parties in this matter, this letter may never have come to my attention.

If the Florida Administrator's matter was moot at the time this letter was written, as Mr. Steinberg indeed suggests it was, why the necessity for this unverified version of the facts at all? If the purpose of the letter was to vindicate the reputation of William Gamble of the Labor Department, then I suggest that perhaps Mr. Gamble ought be a bit more "thick skinned."

But, Mr. Rubin need not be "thick-skinned." As the target of a serious criminal investigation he had a full right, indeed a full right based on our Constitution —to believe that a prosecutor will not engage in misconduct—whether that misconduct occurs before a Grand Jury, at trial, or in an *ex parte* letter addressed to a District Judge. That expectation has not been fulfilled here.

As put in the oft-quoted statement in *Berger v. United States*, 295 U.S. 88 (1935)

> "The United States Attorney is the representative not of an ordinary party to a controversy but

> of a sovereignty whose obligation to govern impartially is as compelling as an obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Not only is it outrageous that this letter was sent at all, but it is absolutely untrue. The facts are as follows: shortly after Florida Administrators, Inc. received their subpoena, Mr. Abe Jordan of that organization telephoned me at my office in Los Angeles. I had never spoken to him or any member of Florida Administrators, Inc. previously. He advised me that he had been served with a subpoena for records concerning Trust Funds associated with Mr. Rubin which were administered by Florida Administrators. He inquired as to what he should do about the subpoena. I advised him that there was nothing that could be done about a Federal Grand Jury Subpoena; that he should comply with the subpoena. The entire conversation including amenities about the weather in Miami probably did not last in excess of one minute. Thereafter, I did not even know that Florida Administrators,

Inc. ever filed a motion to quash until I arrived in Miami for Mr. Rubin's Grand Jury appearance on January 6, 1975. I had never spoken to Mr. Schulte, their attorney, until I arrived outside the Grand Jury room. At that time I introduced myself; our entire conversation concerned Mr. Steinberg's letter to your Honor.

Subsequent to my receiving a copy of the letter, I spoke telephonically with Mr. Steinberg and Mr. Levota of the Strike Force. Mr. Steinberg informed me that the reference in his letter to Bernard Rubin's "attorneys" was not a reference to Mr. Flax and myself, but to another attorney.

I explained that at the time the letter was written Mr. Flax and I were the only attorneys retained to represent Mr. Rubin in this investigation.

Also, I am very troubled by the statement in the letter that there have been ". . . serious efforts by the subject of the investigation to frustrate that investigation, not only with respect to Florida Administrators, Inc., but also in many other aspects that this Court is aware of."

As Mr. Rubin's attorney this allegation truly alarms me. I personally have no knowledge of any improper efforts by Mr. Rubin to frustrate the investigation. To what conduct does Mr. Steinberg refer? Has Mr. Steinberg or any representative of the government had any other *ex parte* communications with the Court? If there have been communications to this Court concerning any conduct of Mr. Rubin, I respectfully request the Court to so advise us. We have not been served by the government with any communication or document in any way whatsoever.

From Mr. Rubin's standpoint, the most troubling aspect is that an allegation of obstruction of justice once made cannot be retracted. It is an allegation easily made; but it is one that under the circumstances is utterly irresponsible.

The governments allegations of impropriety in the instant case raise even a more profound concern; it is a concern that transcends this case and goes to the core of the administration of Federal criminal justice.

From the first day we undertook representation of Mr. Rubin we have been warned by every attorney with whom we have spoken in Miami (and there have been many) that it is a common tactic of the Miami Strike Force to attempt to intimidate attorneys by alleging they are obstructing justice.

I suspect that the reason that the Strike Force is so carefree about alleging obstruction stems from an unwillingness to recognize the proper role of a defense attorney in the pre-indictment stages of a prosecution. Mr. Steinberg says in his letter that he inquired of Mr. Schulte how "they" even knew Florida Administrators, Inc. had been served with a subpoena. His obvious implication is that there is a sinister connotation to be derived if Florida Administrators, Inc. told Mr. Rubin or his attorneys that they had received a subpoena for records concerning Mr. Rubin. In a similar vein, I had a discussion recently with Mr. Hernan Gonzales, an Internal Revenue Special Agent, assigned to the Strike Force. I had telephoned him concerning an IRS summons issued to Mr. Howard Learner, who previously served as an accountant to Mr. Rubin. Mr. Gonzales inquired how I even knew that Mr. Learner

had received a summons. I informed him that Mr. Learner told me.

Then, when I was present in Florida last week, to answer a subpoena for records, I was present at the grand jury room while Mr. Learner testified before the grand jury. When the grand jury adjourned for lunch, in the near presence of Mr. Steinberg, I asked Mr. Learner whether he wished to join Mr. Flax and I for lunch. Mr. Steinberg turned and remarked in an obvious outraged tone, "You mean you're going to interview him right now?". I explained to Mr. Steinberg that I most assuredly was going to interview Mr. Learner.

Apparently, the Strike Force is unwilling to acknowledge that I have the same right to speak to witnesses as they do. If those witnesses wish to speak with me prior to or after their Grand Jury appearances, they may properly do so. Moreover, the fact that a witness must testify truthfully and candidly before the Grand Jury, does not necessarily mean he must be overjoyed about so doing. It is neither improper nor unusual for a Grand Jury witness to communicate with the subject or his attorney.

From my discussions with others I have learned that there has been extensive questioning of Grand Jury witnesses concerning any discussions that such witnesses may have had with various attorneys concerned with this investigation, including myself. I understand that Mr. Schulte has now been subpoenaed as a Grand Jury witness.

This type of attorney-harassment by the Strike Force cannot help but intimidate counsel who are attempting to represent a potential defendant. I cannot help but question whether I am now sufficiently strong to represent my client to the fullest extent to which he is lawfully entitled. I believe that even the most fearless attorney would be intimidated by the aspersions and allegations being leveled. Such invidious attacks which subvertly erode the Sixth Amendment right to counsel should be a matter of extreme concern to everyone involved in our criminal justice system. Moreover, I am gravely concerned about the effect that this highly inflammatory inquiry will have on a lay Grand Jury who assuredly is not instructed as to the proper latitude given to a subject and his attorney at the pre-indictment stages. The very fact that the prosecutor continues to inquire of Grand Jury witnesses about contacts with the defendant and/or his attorneys necessarily creates the inference that such contact is improper. As a consequence, the Grand Jury can easily be improperly inflamed against Mr. Rubin. The prejudice inherent in such conduct is properly the subject of this Court's supervisory power over the Federal Grand Jury. Mr. Steinberg says, "[a] member of the bar should be more responsible when he files an affidavit that could affect the career of a government agent." I believe that a member of the bar should be more responsible when he files an *ex parte* unverified document with a District Judge that *sub rosa* could seriously affect the subject of an investigation

as well as the reputation of other members of the bar.

My reason for writing this letter is not to obtain a censure of Mr. Steinberg. I am far more concerned with the rights of Mr. Rubin and to a fair Grand Jury, and to effective counsel. Accordingly, I would respectfully request this Court to cause further inquiry into this serious matter.

Respectfully,

/s/ Richard L. Rosenfield
RICHARD L. ROSENFIELD
For The Law Firm
RLR/mdlf

cc: The Hon. Charles B. Fulton,
Chief Judge, U.S. District Court
Dougald McMillan, Chief,
Organized Crime and Racketeering
Strike Force—Miami

Marty Steinberg, Special Attorney
Organized Crime and Racketeering
Strike Force—Miami

bcc: Seymour Gopman, Esq.
William Meadows, Esq.
Peter Aiken, Esq.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of December, A.D. 1977.

_____

_____

Supreme Court, U. S.
FILED
MAY 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-792

BERNARD G. RUBIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Supplemental Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1977
No. .....

BERNARD G. RUBIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Supplemental Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Additional Question Presented.

WHETHER THE COURT OF APPEALS PROPERLY IMPOSED THE CONCURRENT SENTENCE DOCTRINE TO PRETERMIT REVIEW OF TWO COUNTS WHICH ENCOMPASSED $329,031 OF $384,331 ALLEGEDLY EMBEZZLED BY PETITIONER.

Introduction and Statement.

On December 2, 1977, petitioner filed a timely petition for writ of certiorari in this Court. The petition raised issues concerning whether constitutionally impermissible impeachment evidence tainted the trial and

whether the Indictment should have been dismissed for failure to record the grand jury proceedings despite timely pre-indictment request.

In the instant trial, the vast bulk of the documentary evidence dealt with the government's contention that petitioner had improperly engaged in multiple duplicate expense billing to the union entities in which he was an officer. However, petitioner was convicted on two counts which charged that as President of both the Southeast Florida Laborers' District Council and Local 666, he had engaged in "unauthorized salary increases, that is, salary increases obtained not in accordance with [the respective entity's constitution] and not in accordance with the laws of the United States." (R. 122). These two counts comprised $329,031 of the $384,331 allegedly embezzled by petitioner.

In the court of appeals, petitioner argued that the convictions on these counts were tainted (1) because the district court had excluded highly relevant state of mind evidence due to an erroneous belief that the evidence constituted hearsay and (2) that petitioner was prejudiced by the improper use of codified federal civil law on fiduciary responsibility and exculpatory resolutions.[1]

In affirming the convictions herein, the court of appeals pretermitted review of the two salary increase counts (559 F.2d 975, 990 at fn. 14; App. 37):[2]

> "Two claims, one asserting that the trial court improperly excluded certain defense evidence as hearsay and one challenging the court's instructions on the fiduciary duties of a union official under 29 U.S.C. §501(a) were raised pertinent to the embezzlement counts that charged unlawful salary increases. We need not reach these claims because of the operation of the concurrent sentence doctrine."

[1]These arguments were contained within appellant's opening brief pp. 33-47. A copy of the brief is being lodged contemporaneous to the filing of this petition.

[2]"App." is a reference to the Appendix to our initial Petition for a Writ of Certiorari.

Subsequent to the filing of the petition herein, counsel for petitioner became aware of the recent Eighth Circuit decision in *United States v. Holder,* 560 F.2d 953 (1977), which reassessed and abandoned the concurrent sentence doctrine in view of the current policy of the United States Board of Parole which results in an increased period of incarceration for persons convicted on multiple counts. In concluding that the concurrent sentence doctrine "ought not to be invoked where there is a likelihood that its application may expose a defendant to the risk of adverse consequences caused by an invalid but unreversed conviction" (*Id.* at 955), the court determined that the practical effect of application of the doctrine resulted in an increased period of incarceration (*Id.* at 956):

> "In this instance, we can identify at least one circumstance in which our failure to review an erroneous count will expose the defendant to potential adverse consequences. In assessing a prisoner's eligibility for parole, parole boards are instructed to consider a number of factors, including the prisoner's 'offense severity rating' and his 'salient factor score.' Both are determined pursuant to guidelines published by the United States Board of Parole. To calculate a prisoner's offense severity rating, the Board has established severity ratings for various offenses and a recommended time range

for parole which corresponds to a particular severity rating. Among the notes to the published guidelines, there appears the statement, 'If an offense behavior involved multiple separate offenses, the severity level may be increased.' Thus, the guidelines and explanatory notes confirm the fact that our failure to review a particular count of a multi-offense conviction may well lead to a higher severity rating and, accordingly, reduced parole opportunities.

In addition, the salient factor score, which is also used in assessing a prisoner's eligibility for parole, establishes a point rating based in part on the offender's number of prior convictions. Multiple offenses are considered as a single conviction, for rating purposes, where the various counts arise from a single offense behavior. For example, when a defendant is convicted of several heroin sales occurring within a limited time period, say two months, those offenses are treated as a single behavior and rated as a single conviction. When, on the other hand, related offenses were committed over a longer period of time, they may be treated as arising out of separate offense behaviors and rated as separate convictions under the salient factor formula. This is but another way in which our failure to review an erroneous count under the concurrent sentence rule may, in fact, prejudice a defendant's chances for early parole.

For many years, we have applied the concurrent sentence rule in the interest of judicial economy with the reservation that it not be followed where it might expose the defendant to substantial risk of adverse consequences. *Sanders v. United States,*

541 F.2d at 193; *United States v. Belt,* 516 F.2d 873. Until recently, we have lacked evidence that applying the concurrent sentence rule would influence parole status decisions. It now appears that the United States Board of Parole's regulations for determining parole eligibility necessitate a reassessment of that doctrine. Because we have identified the possibility of adverse consequences, we will consider the validity of Holder's evidentiary claim." [Footnotes omitted].

The court also noted the government's *concession* that application of the concurrent sentence rule might prejudice that defendant under the Board of Parole's current regulations.

Upon learning of the principles espoused by *Holder,* petitioner's counsel promptly filed a petition for rehearing in the United States Court of Appeals for the Fifth Circuit, raising only whether the court properly imposed the concurrent sentence doctrine in the instant case. Contemporaneously, petitioner filed a Motion to Withhold Determination on Petition for Writ of Certiorari in this Court.

Thereafter, the Fifth Circuit invited the government to respond to our Petition for Rehearing. On March 27, 1978, the court of appeals granted leave to file the petition.[3]

In its response to our supplemental petition in the court of appeals, the government conceded, as indeed

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[3]The government's response conceded that the Fifth Circuit possessed jurisdiction to consider the supplemental petition. Similarly, this Court has jurisdiction to consider this supplemental petition despite its not being filed within the original thirty (30) day period. *Schact v. United States,* 398 U.S. 58 (1970); *Durham v. United States,* 401 U.S. 481 (1971).

was required, that according to the Bureau of Prisons guidelines, the effect of the unreviewed and extant counts was to raise the severity of his offense from "high" ($20,000 to $100,000) to "very high." (Brief for Appellee in response to Appellant's Supplemental Petition for Rehearing (page 12); See 42 Fed. Reg. 39813-39815). Thus, assuming petitioner would receive a salient factor score that gave him a "very good" parole prognosis, the guidelines recommend that he serve 26-36 months where the offense characteristic is "very high" instead of 16-20 months where the offense has a "high" severity characteristic (42 Fed. Reg. 39813-39814).

On April 11, 1978, the supplemental petition for rehearing was denied.

The Court of Appeals Improperly Invoked the Concurrent Sentence Doctrine to Pretermit Review of Two Counts Which Encompassed $329,031 of $384,331 Allegedly Embezzled by Petitioner; This Court Should Grant Review to Provide Guidance and Resolve a Conflict in the Circuits as to Imposition of the Doctrine.

The instant case presents a primordial context within which this Court can provide guidance to the various circuits in the application of the concurrent sentence doctrine. Since *Benton v. Maryland*, 395 U.S. 784 (1969), disparate application of the doctrine has become indeed its hallmark. Here, assuming the Bureau of Prisons will follow its own guidelines,[4] the effect of the unreviewed count is to escalate the likely period

[4]As we argue, *infra*, "experience indicates that the overwhelming majority of parole decisions fall within the guidelines" *Ruip v. United States*, 555 F.2d 1331, 1333 (6th Cir. 1977).

of petitioner's incarceration from 16-20 months to 26-36 months.

We, of course, recognize that we have tendered this issue to the Court in a "piecemeal" context. Yet, we respectfully request this Court's discretion to not penalize petitioner as a consequence. Manifestly, the timing was caused by counsel's non-recognition of the potential adverse effect on petitioner's parole eligibility. As counsel explained to the court of appeals, the supplemental petition for rehearing was filed promptly after counsel learned of the Eighth Circuit decision in *Holder, supra*. It certainly would not follow that any tactical decision caused the delay in asserting the claim. We turn then to a consideration of the merits of the issue we proffer.

Petitioner Is Likely to Suffer Adverse Collateral Consequences From the Unreviewed Counts.

In *Benton v. Maryland*, 395 U.S. 784 (1969), this Court determined that a concurrent sentence did not raise a jurisdictional bar to consideration. Nevertheless, the Court opined that the concurrent sentence doctrine may have some continuing validity as a rule of judicial convenience (*Id.* at 791). The touchstone for resolving the appropriateness *vel non* of the application of the doctrine is whether adverse collateral consequences may flow from the conviction.

The likelihood of harm to petitioner in the instant case is manifest. The government contended in the court below that the application of the doctrine is proper, claiming that petitioner's claim is "premature" and that "we do not know yet what action the Commission will take" (Brief for Appellee, *supra*, at page 15). In the event the Commission were to rate petitioner

in the "very high" category based on the unreviewed embezzlement counts, the government's suggested remedy for petitioner is to "challenge that designation through the administrative appeals procedure . . . and if unsuccessful, in the courts" (*Ibid.*). This disingenuous approach by the government overlooks the underpinnings to the concurrent sentence doctrine. Plainly, the doctrine is properly applied only where the court can be assured that collateral consequences will not flow from the failure to afford review. As *Holder* and similar cases recognize, where, as here, the Bureau of Prisons guidelines establish the potential adverse consequences *prima facie*, a person seeking review on direct appeal of a conviction is entitled to plenary review. Although, as the government contends, Congress has vested the Parole Commission with "very broad discretion" which would permit the Parole Board to make decisions outside the guidelines where circumstances warrant, "nevertheless experience indicates that the overwhelming majority of parole decisions fall within the guidelines," *Ruip v. United States*, 555 F.2d 1331, 1333 (6th Cir. 1977); *United States v. Salerno*, 538 F.2d 1085, 1087 (3rd Cir. 1976); *Kortness v. United States*, 514 F.2d 167, 169 (8th Cir. 1975); *Project, Parole Release Decision Making and the Sentencing Process*, 84 Yale L.J. 810, 825 n.75 (1975).

It is a strange anomaly indeed for the government to suggest that despite the guidelines, a defendant is "premature" and speculative in suggesting that the administrative agency will follow its own guidelines. Our argument, of course, acquires greater efficacy by the experience that the Commission does indeed follow its guidelines. It certainly does not further the interest of judicial economy to ignore the guidelines in order

to pretermit review of claims on direct appeal by a finding of no collateral consequences then invariably face the issues in future litigation, when in fact the Commission acts precisely as the guidelines suggested it would act. Moreover, to require a litigant to await the actual violative act by the Parole Commission, then institute action within the agency and later the courts could result in sufficiently extended litigation that outlasts the term of service of the incarceration. Indeed, in *Sibron v. New York*, 392 U.S. 40, 57 (1968), the Court cogently observed:

> [I]t is far better to illuminate the source of a potential legal disability than to require the citizen to suffer the possible unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action."

The government was similarly in error in its contention to the court below that the Parole Commission could properly consider the conduct alleged in the unreviewed counts even in the event the court reversed the convictions. While the Parole Commission has broad discretion to consider underlying facts supporting alleged criminal behavior of the prisoner, the government's argument simply ignores the critical aspect of our challenge to these counts. Our argument as to the invalidity of these counts reflected our view that the indictment charged conduct which did not amount to a criminal offense.[5] Thus, if a court reviews these counts and agrees with our contention, the Parole

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[5]Thus, as we pointed out in our opening brief, appellant moved the district court for dismissal of these counts for failure to state an offense (Opening Brief, p. 41).

Commission will properly be deprived of consideration of these underlying facts—since they would not be considered criminally culpable conduct. Moreover, the other argument which was pretermitted on our original appeal—that the trial court improperly excluded highly relevant and admissible evidence pertaining to appellant's state of mind—goes directly to appellant's innocence of the offenses. Accordingly, the Parole Commission could not properly consider any conduct contained within these counts, after reversal.

Moreover, as we urged to the court below, petitioner is currently defending a civil action launched by a District Council member (*Jackson v. Rubin,* U.S.D.C. S.D. Fla., No. 75-2942-Civ). The plaintiff has moved for a partial summary judgment, claiming that defendant is collateraly estopped from litigating the validity of his salary increases. The government contended to the court of appeals that "appellant's conviction of salary embezzlement does not preclude him from challenging that evidence in the civil suit brought by the union. See *Ashe v. Swenson,* 397 U.S. 436, 442 (1970)" (Brief for Appellee, *supra,* at page 13, fn. 7). Unfortunately, *Ashe* does not support the government's position. In our view, the implication resulting from *Ashe* is that if review of the entire record reveals that the same issue necessarily inhered in the verdict, the defendant would be collaterally estopped from relitigating the issue in a civil trial. Indeed, petitioner did not oppose the plaintiff's motion by claiming the inapplicability of collateral estoppel. Rather, petitioner claimed that the court should not grant a summary judgment because petitioner has never received appellate review to the validity of the conviction on the salary embezzlement counts. We urged there, as we do here, that

petitioner's arguments as to the invalidity of the counts struck at the guilt finding process, *i.e.,* whether petitioner was in fact guilty of the offense. In our view, the imposition of a civil penalty of the magnitude involved here was sufficient "collateral legal disadvantage" *Pollard v. United States,* 352 U.S. 354, 358 (1957), to militate in favor of appellate review. See also *Sibron v. New York, supra,* at page 55.

The Court Should Grant Review to Settle This Important Issue Upon Which the Circuits Are in Conflict.

As exemplified by the case at bar, in numerous cases, the federal circuits have grappled with the concurrent sentence doctrine with disparate results. The result of this disparity is an irregular and elusive exercise of the purported rule of judicial convenience both within and among the courts of appeal in the various circuits.

Despite the application of the concurrent sentence doctrine by the court below, the rule we espouse, *i.e.,* the non-application of the concurrent sentence doctrine where parole eligibility may be affected is consistent with the reasoning of other courts. *United States v. McKenzie,* 414 F.2d 808, 811 (3rd Cir. 1969); *United States ex rel. LaMolinare v. Duggan,* 415 F.2d 730 (3rd Cir. 1969); *Close v. United States,* 450 F.2d 152 (4th Cir. 1971); *United States v. Machibroda,* 338 F.2d 947 (6th Cir. 1964); *United States v. Tanner,* 471 F.2d 128, 140 (7th Cir. 1972); *Wright v. United States,* 519 F.2d 1964 (7th Cir. 1972); *United States v. Clermon,* 432 F.2d 1215 (9th Cir. 1970); *Fuller v. United States,* 407 F.2d 1199, 1233 n.52 (D.C. Cir. 1968); *Kee v. United States,* 418

F.2d 465 (D.C. Cir. 1969). See also *Cramer, Concurrent Sentence Doctrine Limited,* 36 D.C. Bar J. 46 (1969).

The Seventh Circuit has adopted the approach that where there exists any possibility of adverse legal consequences resulting from not reviewing the validity of all the challenged convictions, such challenged counts will be reviewed. *United States v. Tanner, supra; Wright v. United States, supra; United States v. McLeod,* 493 F.2d 1186, 1189 (7th Cir. 1974).

In the Second Circuit, while a recent decision used language similar to *Tanner, supra* (*United States v. Daley,* 564 F.2d 645, 647 fn.2 (2d Cir. 1977)), other cases in the circuit have not employed the approach of "any possibility" of collateral consequences requiring review but, instead, have limited such review where "the possibility of any future collateral consequences seems too remote." See *United States v. Febre,* 425 F.2d 107, 113-114 (2d Cir.), *cert. denied* 400 U.S. 849, 92 S.Ct. 40, 27 L.Ed.2d 87 (1970). See also *United States ex rel. Weems v. Follette,* 414 F.2d 417, 419 (2d Cir. 1969), *cert. denied* 397 U.S. 950, 90 S.Ct. 973, 25 L.Ed.2d 131 (1970).

In his dissenting opinion in *Febre,* Chief Judge Hayes argued that prejudice should be presumed when there is no review of a challenged count:

> "While Benton v. Maryland does not expressly rule out for all purposes the concurrent sentence doctrine, it manifests such basic dissatisfaction with the doctrine as to suggest that its total elimination merely awaits a proper case . . .
>
> The effect to be given *Benton* must, it seems to me, require a change in our rule from one

> providing that in the case of concurrent sentences, the questioned conviction on one count will not be considered unless it can be shown that the defendant would be prejudiced if the conviction was unjustified, see United States v. Barash, 365 F.2d 395 (2d Cir. 1966), to one providing rather that prejudice will be presumed unless it is clearly shown that in fact no prejudice would result. See United States ex rel. Weems v. Follette, 414 F.2d 417 (2d Cir. 1969)."

Although no guidelines emerge from the Sixth Circuit decisions, that court has often exercised its discretion under *Benton* to review multiple convictions, *United States v. Jones,* 533 F.2d 1387, 1390 (6th Cir. 1976); *United States v. Maze,* 468 F.2d 529 (6th Cir. 1974), affirmed 414 U.S. 395, *cf. Ethridge v. United States,* 494 F.2d 351 (6th Cir. 1974), *cert. den.* 419 U.S. 1025.

The Third Circuit in a case which immediately followed *Benton* in 1969 exercised its discretion to review the challenged count. *United States v. McKenzie,* 414 F.2d 808, 811 (1969):

> "While the Court in *Benton* did not resolve the question of whether prejudice beyond that inherent in being convicted of two offenses and serving two sentences therefor, albeit concurrently, must be shown to obtain relief, sufficient prejudice was found in the possibility that the defendant might someday be subject to an habitual criminal statute and have both convictions counted against him. We reject the Government's contention here because we also find that there is sufficient prejudice here to justify vacating the lesser concurrent sen-

tences if it was error to sentence appellant on counts one and two. As was said in Hibdon v. United States, 204 F.2d 834, 839, 37 A.L.R.2d 1130 (6th Cir. 1953): 'it is well understood that a multiplicity of sentences impairs a prisoner's opportunities for pardon or parole.' "

In a later Third Circuit case, *United States ex rel. LaMolinare v. Duggan,* 415 F.2d 730, 736 (1969), Judge Stahl noted his view that Benton signaled the death knell for the concurrent sentence doctrine:

> "The concurrent sentence doctrine, which reached its pinnacle in *Hirabayashi v. United States* [cites omitted] only recently met its demise in *Benton v. Maryland* [cites omitted]."

The Fourth Circuit considers the substantial "harm" that would result if the appellant's challenged count were not considered. See *Close v. United States,* 450 F.2d 152, 155 (4th Cir. 1971), citing *Fuller v. United States,* 407 F.2d 1199, 1233 n.52, *cert. den.* 393 U.S. 1120, 89 S.Ct. 999, 22 L.Ed.2d 125.

The Eighth Circuit, of course, now flatly conflicts with the decision reached here. See *Holder, supra.* See also *Sanders v. United States,* 541 F.2d 190, 193-194 (8th Cir. 1976); *United States v. Neff,* 525 F.2d 361, 363-365 (dissenting opinion).

The Ninth Circuit treatment of the concurrent sentence doctrine since *Benton* has been one of deference to the rule of judicial convenience. See *Jordan v. United States,* 416 F.2d 328, 346 (9th Cir. 1969) where the court summarily concluded that the "guilt on six other counts of the indictment makes it unnecessary for us to decide whether the assessment of

guilt on the seventh count . . . is valid." See also *van Gelden v. Field,* 498 F.2d 400, 403 (9th Cir. 1974).

The District of Columbia has adopted a rule that (*United States v. Hooper,* 432 F.2d 604, 606 (1970)):

> "Where there is doubt of the concurrent convictions the sound course, we think, is either to determine the matter on the merits, as in *Benton* or to vacate the sentence because of the overall interest of justice in effective disposition of appellate dockets, at least where there is neither injustice done defendant nor a need of the government overridden."

See also *United States v. Casson,* 434 F.2d 415, 417 n.8 (D.C. Cir. 1970); *Justin v. Jacobs,* 449 F.2d 1017, 1019-1020 (D.C. Cir. 1971); *United States v. Battle,* 510 F.2d 776, 777 (D.C. Cir. 1975).

Moreover the Fifth Circuit's own decisions create conflict within the circuit. Thus, in *Holland v. United States,* 384 F.2d 370 (5th Cir. 1967), the court also refused to invoke the concurrent sentence doctrine to preclude review. Explaining *United States v. Machibroda,* 338 F.2d 947 (6th Cir. 1964), the court stated:

> "The court held that the imposition of the concurrent sentences was improper. In its opinion, the court observed that the fact that the robbery sentences were longer than the concurrent 'entering with intent to rob' sentences did not render the appellant's appeal frivolous, saying: '[I]t is well understood that a multiplicity of sentences impairs a prisoner's opportunity for pardon and parole.'
> Also, in Audett v. United States, the court rejected as improper the proposition of concurrent sen-

> tences for simultaneous violations of more than one provision of 18 U.S.C.A. §2113. That a multiplicity of concurrent sentences is prejudicial as impairing a prisoner's opportunity for pardon or parole was also recognized in Hibdon v. United States, 6 Cir. 1953, 204 F.2d 834, 839, and in Green v. United States, 1 Cir. 1960, 274 F.2d 59, 61."

See also *United States v. Wilkerson,* 469 F.2d 967 (5th Cir. 1972); *United States v. Driscoll,* 454 F.2d 792, 801 (5th Cir. 1972); See *United States v. Windom,* 510 F.2d 989, 996 (5th Cir. 1975). Compare *United States v. Bingham,* 421 F.2d 1344, 1346 (5th Cir. 1970); *United States v. Binetti,* 547 F.2d 265 (5th Cir. 1977); *United States v. Ordoneaux,* 512 F.2d 63 (5th Cir. 1975).

In the court below, while urging affirmance of the convictions herein, the government nevertheless conceded that the courts of appeals have "taken varying approaches" (Appellee's Brief, *supra,* at p. 11 fn. 6) as to whether to impose the doctrine.

This Court has not since *Benton* treated the current viability or indeed established guidelines to guide the exercise of discretion by the various circuits. The resulting disparity creates an issue of grave importance which requires this Court's attention. The instant case presents a ripe controversy which portrays the real and substantial likelihood of significant adverse consequences should the salary embezzlement counts remain unreviewed. Ultimately, this case should properly be remanded to the court of appeals with instructions to afford the review previously denied.

Conclusion.

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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Attorneys for Petitioner.

FLAX AND ROSENFIELD,
Of Counsel.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of May, A.D. 1978.

_____

_____

Supreme Court, U. S.
FILED
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No. 77-792

In the Supreme Court of the United States

OCTOBER TERM, 1977

BERNARD G. RUBIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 559 F. 2d 975.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1977. A petition for rehearing was denied on November 2, 1977. A petition for a writ of certiorari was filed on December 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether inquiry of two defense witnesses on cross-examination about their prior refusal to testify before the grand jury warrants reversal of petitioner's conviction.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of 103 counts charging that he embezzled funds from union and employee welfare benefit plans (in violation of 29 U.S.C. 501(c), 18 U.S.C. 664), racketeering (in violation of 18 U.S.C. 1962(c)), false statements on income tax returns (in violation of 26 U.S.C. 7206(1)) and failure to keep labor union records (in violation of 29 U.S.C. 436, 439). Petitioner was sentenced to concurrent terms of five years' imprisonment on each count and fined a total of $50,000 on five different counts. He was further ordered to forfeit all his union and trust fund positions and his right to seek such positions in the future. In a comprehensive opinion (Pet. App. A 1-44), the court of appeals affirmed his conviction and the order of forfeiture, but deleted the provision that petitioner could not seek and hold office in the future.

1. Petitioner was the Special International Representative of the Laborers' International Union of North America, President of the Southwest Florida Laborers' District Council (District Council)—an umbrella organization supervising several unions—President of the Concrete Products & Material Yard Workers Local No. 666, Business Manager of Local No. 478, and trustee of several labor trust funds. During his occupancy of these positions, petitioner embezzled monies from these unions and trust funds by submitting duplicate expense vouchers, mostly for travel and entertainment, and thereby receiving multiple reimbursements for expenses incurred (Pet. App. A 8).

The evidence also showed that petitioner granted himself over $300,000 in unauthorized salary increases as an officer of Local 666 and the District Council, that he inadequately documented disbursements from the union treasury and that he received substantial income in excess of the amount reported on his income tax returns (Pet. App. A 9).

2. Kenton Wells, an organizer for the District Council, and Jack Gordon, an organizer for the District Council and Local 666, were two of eight defense witnesses who testified, in corroboration of petitioner's evidence, that during the relevant years petitioner had given subordinates large amounts of cash for use in organizing union campaigns and had spent large amounts of cash entertaining management figures (Pet. App. A 11).

In an effort to impeach the testimony of Wells, the government brought out on cross-examination that he had previously refused to testify before a federal grand jury investigating the activities of southern Florida laborers' organizations.[1] At one point, Wells volunteered that he "took the Fifth Amendment" (Tr. 1521).[2] Defense counsel objected on the grounds that "[t]here is nothing inconsistent about a witness' trying to invoke the Fifth Amendment in front of a grand jury and testifying here" (Tr. 1521). The court overruled his objection, stating: "I think that is proper cross-examination," but cautioned the government to bring out that fact and "then drop it" (Tr. 1522).

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[1]The government inquired as follows (Tr. 1522-1523):

Q. Without respect to the exact date, sir, did you appear twice before the Federal Grand Jury?

A. Yes, sir.

Q. Were you asked questions concerning your labor-union activities and Mr. Rubin?

A. Yes, sir.

Q. Did you refuse to testify on both of those occasions?

A. Yes, sir, I did.

[2]The full colloquy is set out in the opinion of the court of appeals (Pet. App. A 11-13, n. 1).

Jack Gordon was also questioned as to his previous refusal to testify (Tr. 1622-1623):

Q. Mr. Gordon, did you appear at the Federal Grand Jury on May 27, 1975?

A. I don't remember the date, I appeared there, yes, at the grand jury.

Q. Did you ever refuse to testify?

A. Yes, I did.

Petitioner's counsel again interposed an objection which the trial court overruled (Tr. 1623).

As part of summation, the prosecutor commented on the testimony of Wells and Gordon, arguing that there was a contradiction between their corroboration of petitioner's exculpatory story at trial and their refusal to testify before the grand jury (Pet. App. A 14).

3. In upholding petitioner's conviction, the court of appeals found that the government's impeachment of Wells and Gordon was improper but did not constitute reversible error. In reaching this conclusion, the court applied the harmless error test of *Kotteakos* v. *United States*, 328 U.S. 750, 764-765, rather than the constitutional standard of *Chapman* v. *California*, 386 U.S. 18, finding that the improper impeachment "tainted [petitioner's] trial at most to such a marginal extent that the judgment must be affirmed * * *" (Pet. App. A 24-25).

ARGUMENT

It is settled that "the Fifth Amendment privilege [against self-incrimination] is a personal privilege * * *" *Couch* v. *United States*, 409 U.S. 322, 328. See also *Fisher* v. *United States*, 425 U.S. 391, 396-397.[3] Accordingly, "a defendant may not object to the violation of another person's privilege * * *" *Doyle* v. *Ohio, supra*, 426 U.S. 610, 627 (Stevens J., dissenting) (footnote omitted). See *Massiah* v. *United States*, 377 U.S. 201, 206-207; cf. *Alderman* v. *United States*, 394 U.S. 165, 174. Since the government referred to the silence of witnesses, not of petitioner, the question whether eliciting that fact on cross-examination is reversible error is governed by the principles enunciated in *Namet* v. *United States*, 373 U.S. 179. The first inquiry under *Namet* is whether the government made "a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege." 373 U.S. at 186. While the prosecutor in this case did knowingly ask the witnesses about their prior silence, he did so with the approval of the trial court (Tr. 1518-1519). Nor was the prosecutor acting in bad faith. He believed that he was entitled to bring out on cross-examination the fact that these same witnesses who were now presenting detailed exculpatory testimony regarding petitioner's union affairs had previously refused to give any testimony about the subject. Even if this view was mistaken, it was not a "conscious and flagrant attempt" to deny petitioner his rights.

---

[3]In both *United States* v. *Hale*, 422 U.S. 171, and *Doyle* v. *Ohio*, 426 U.S. 610, it was *defendant* who was questioned at his trial about *his* silence.

Nor was petitioner unfairly prejudiced under the second aspect of the *Namet* test, which justifies reversal where the "inference from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination." 373 U.S. at 187. As the court below found in this regard (Pet. App. A 31):

> the possibility that the jury believed [defense witnesses] Feder and Wright but rejected the defense because of the improper impeachment of Gordon and Wells is remote. Moreover, given the sum of Gordon's and Wells's testimony, the possibility is equally slim that the jury disbelieved the remaining defense witnesses but would have accepted the defense absent the improper impeachment. In light of the balance of the evidence and the place of Wells and Gordon in the defense lineup, we cannot conclude that the erroneous impeachment use of their refusal to testify before the grand jury was prejudicial under the *Kotteakos* standard. Were that balance any different or the testimony of Wells and Gordon of any more apparent importance, different considerations would obtain. As this record stands, however, we harbor nothing approaching a "grave doubt" that the error did not exert a substantial influence on the jury. We think it clear that the error was harmless. [Footnote omitted.][4]

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[4]There is no merit to petitioner's claim that the decision below conflicts with the rule established by the Ninth Circuit in *United States* v. *Price*, 474 F. 2d 1223, that a record of grand jury proceedings must be made, when requested, absent a government showing that it has a legitimate and compelling interest to be served by non-recordation. The government did record the testimony of all witnesses and gave it to the defense; only the remarks and comments of the prosecutor and his instructions of law to the grand jury were unrecorded. While it may be the better practice to record the testimony of all witnesses and the comments of the prosecutor (see *United States* v. *Peden*, 472 F. 2d 583 (C.A. 2)), there is no constitutional or statutory requirement of recording. See, *e.g.*, *United States* v. *Solimine*, 536 F. 2d 703 (C.A. 6), vacated on other grounds, 429 U.S. 990; *United States* v. *Flanagan*, 455 F. 2d 263, 265 (C.A. 5), certiorari denied, 404 U.S. 1060. Indeed, many comments during a criminal trial are "off the record" and hence not recorded. As the court below found (Pet. App. A 32), petitioner's unsubstantiated, speculative assertions of improprieties in the proceedings" are insufficient to show that he was denied fundamental fairness so as to merit dismissal of the indictment. The Ninth Circuit itself requires a showing of prejudice and has not, as petitioner suggests (Pet. 45), adopted a "prophylactic rule" whose violation without more requires dismissal. *United States* v. *Price*, *supra*, 474 F. 2d at 1226.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[5]

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Assistant Attorney General.

JEROME M. FEIT,
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MARCH 1978.

[5]The Court may wish to defer action on the petition until the court of appeals determines whether it will entertain a second petition for rehearing presently pending before that court and to which the United States has been asked to respond. See petitioner's Motion to Withhold Determination.

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No. 77-792

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BERNARD G. RUBIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CURCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals is reported at 559 F. 2d 975.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1977. A petition for rehearing was denied on November 2, 1977. The petition for a writ of certiorari was filed on December 2, 1977. A supplemental petition for rehearing was denied by the court of appeals on April 11, 1978. The supplemental petition for a writ of certiorari was filed on May 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly invoked the concurrent sentence doctrine in deciding not to review two of the 103 counts on which petitioner was convicted.

STATEMENT

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on 103 counts charging him with embezzlement of funds from union and employee welfare benefit plans (in violation of 29 U.S.C. 501(c), 18 U.S.C. 664), racketeering (in violation of 18 U.S.C. 1962(c)), false statements on income tax returns (in violation of 26 U.S.C. 7206(1)), and failure to keep labor union records (in violation of 29 U.S.C. 436, 439). He was sentenced to five years' imprisonment on each of 86 embezzlement counts,[1] three years' imprisonment on each of three tax evasion counts, and one year's imprisonment on each of eight counts charging a failure to keep union records. He was also fined a total of $50,000. All prison sentences were to run concurrently.[2] The court of appeals affirmed in a comprehensive opinion (Pet. App. 1-44).[3]

Relying on the concurrent sentence doctrine, the panel declined to consider two claims relating only to the two embezzlement counts charging petitioner with obtaining unlawful salary increases (Pet. App. 37 n. 14).[4] These two counts involved approximately $329,000.

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[1]Petitioner was acquitted on two embezzlement counts.

[2]Our brief in opposition mistakenly reported that petitioner was sentenced to concurrent terms of five years' imprisonment on each of the 103 counts.

[3]"Pet. App." refers to the Appendix in the original petition.

[4]The remaining 84 embezzlement counts were based on petitioner's receipt of multiple reimbursement for expenses incurred in the course of his duties as a union officer and representative. Petitioner illegally obtained approximately $55,000 through the submission of duplicate vouchers, primarily for travel and entertainment expenses.

2. Petitioner filed a timely petition for rehearing arguing that the prosecutor improperly cross-examined two defense witnesses about their prior refusal to testify before the grand jury. The court of appeals denied the petition on November 2, 1977. Petitioner thereupon filed a petition for a writ of certiorari raising the same claim as in his petition for rehearing. That claim was unrelated to the two counts on which the court of appeals pretermitted review in reliance on the concurrent sentence doctrine.

On January 23, 1978, petitioner filed a supplemental petition for rehearing in the court of appeals. He contended that the panel should not have invoked the concurrent sentence doctrine and instead should have reviewed the unauthorized salary increase counts. Petitioner theorized that, under current United States Parole Commission guidelines, he will be subject to a longer period of incarceration if the two embezzlement counts are left unreviewed than he would be if the two counts were reviewed and reversed.

Under the guidelines, the approximate length of time to be served before release on parole is determined by reference to a matrix involving two variables, the severity of the offense committed and the personal characteristics of the offender.[5] See 42 Fed. Reg. 39813-39815, as amended by 42 Fed. Reg. 52399 (to be codified at 28 C.F.R. 2.20). The severity of embezzlement depends on the amount embezzled. The offense's possible designations, together with the corresponding monetary

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[5]The guidelines assign each prospective parolee a "salient factor score" based on the following considerations: number of prior convictions, number of prior incarcerations, age at first commitment, parole and probation history, employment history, history of heroin or opiate dependence, and whether the commitment offense involved auto theft or checks.

amounts, are as follows: "low moderate" (less than $1,000), "moderate" ($1,000 to $19,999), "high" ($20,000 to $100,000), and "very high" ($100,000 to $500,000) (42 Fed. Reg. 39813-39814). The 84 embezzlement counts reviewed by the court of appeals involved approximately $55,000. The two unauthorized salary increase counts on which the panel pretermitted review involved $329,031. Taken together, all the embezzlement counts would qualify petitioner's offense for placement in the "very high" severity category; the reviewed counts alone would indicate a "high" severity rating.[6] Within any given personal characteristics category, the guidelines recommend a term of incarceration that increases as offense severity increases. For example, if petitioner were to receive a "very good" personal rating, the recommended period of incarceration would be 26-36 months if the offense severity were "very high" and 16-20 months if the offense severity were only "high."

DISCUSSION

We believe that the court of appeals should not have applied the concurrent sentence doctrine in the circumstances of this case. Petitioner challenged his two unreviewed embezzlement convictions on grounds relating to his guilt or innocence, and the unreviewed counts, when considered by the Parole Commission, will qualify petitioner's commitment offense for placement in the "very high" rather than the "high" severity category.[7]

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[6]The Parole Commission retains discretion to depart from the guidelines "[w]here the circumstances warrant * * *." See 49 Fed. Reg. 39813, §2.20(c), (d).

[7]Although its guidelines do not obligate the Parole Commission to rate petitioner's offense severity in the "very high" category, the probability is great that the Commission will adhere to the guideline recommendations in any given case. See, *e.g.*, *Ruip* v. *United States*, 555 F. 2d 1331 (C.A. 6); *United States* v. *Salerno*, 538 F. 2d 1005 (C.A. 3).

Under these circumstances, there is a significant likelihood that petitioner will suffer adverse collateral consequences as a result of the unreviewed convictions. Application of the concurrent sentence doctrine in such a situation is improper.

In *Benton* v. *Maryland*, 395 U.S. 784, 787-791, this Court reviewed the historical evolution of the concurrent sentence doctrine and recognized the utility of that doctrine as "a rule of judicial convenience." Finding that the dispute in *Benton* did not present the question, the Court expressly abstained from considering whether constitutional problems might be created by "an attempt to impose collateral consequences after an initial refusal to review a conviction on direct appeal because of the concurrent sentence doctrine * * *" (395 U.S. at 791 n. 7). In his concurring opinion, Mr. Justice White agreed that "the concurrent sentence rule * * * should be preserved as a matter of proper judicial administration both on direct appeal and collateral attack, although at least in theory it raises a number of questions concerning the subsequent effects of the unreviewed counts" (395 U.S. at 800). See also *Andresen* v. *Maryland*, 427 U.S. 463, 469 n. 4; *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

In the aftermath of *Benton*, the Fifth Circuit has stated that application of the concurrent sentence doctrine is appropriate when "prejudice is not apparent and the possibility of adverse collateral consequences appears to be remote." *United States* v. *Binetti*, 547 F. 2d 265, 269 (C.A. 5). See also *United States* v. *Smith*, 550 F. 2d 277, 285 (C.A. 5); *Government of the Canal Zone* v. *Fears*, 528 F. 2d 641, 644 (C.A. 5). Cf. *Carafas* v. *LaVallee*, 391 U.S. 234, 237. In an effort to demonstrate that the possibility of adverse collateral consequences from his unreviewed convictions is more than remote, petitioner points to the potential effect of those convictions on his prospects for

parole. He cites a recent Eighth Circuit decision in which the court of appeals refused to apply the concurrent sentence doctrine because it feared an unreviewed conviction would reduce appellant's parole opportunities. See *United States* v. *Holder*, 560 F. 2d 953 (C.A. 8).[8] Resolution of the issue thus presented requires an inquiry into the usual basis for Parole Commission determinations regarding the length of time to be served before release.

The Parole Commission advises us that in assigning a severity rating to the offense or offenses for which a prisoner has been incarcerated, it looks to the actual conduct underlying the criminal charges brought against him. As reflected in the United States Parole Commission Research Unit, *Guideline Application Manual* (November 1977),[9] the Commission considers any specific criminal

[8]Despite its ruling in *Holder*, the Eighth Circuit has not abandoned the concurrent sentence doctrine. See, *e.g.*, *United States* v. *Eisler*, 567 F. 2d 814, 818 (C.A. 8).

Other courts of appeals have followed a variety of approaches. The Seventh Circuit, for example, has said that it will consider the validity of all challenged convictions unless "there is no possibility of undesirable collateral consequences attendant upon these convictions." *United States* v. *Tanner*, 471 F. 2d 128, 140 (C.A. 7), certiorari denied, 409 U.S. 949; see also *Crovedi* v. *United States*, 517 F. 2d 541, 550 (C.A. 7); *United States* v. *McLeod*, 493 F. 2d 1186, 1189 and n. 1 (C.A. 7). The Sixth Circuit has exercised its discretion to resolve some claims and pretermit others, without stating a general rule. Compare, *e.g.*, *United States* v. *Maze*, 468 F. 2d 529 (C.A. 6), affirmed, 414 U.S. 395, with *Ethridge* v. *United States*, 494 F. 2d 351 (C.A. 6), certiorari denied, 419 U.S. 1025. The District of Columbia Circuit routinely vacates concurrent sentences, subject to reinstatement and full appellate review if the sentence considered and affirmed on appeal should be set aside by this Court or on collateral attack. See, *e.g.*, *United States* v. *Hooper*, 432 F. 2d 604 (C.A. D.C.).

[9]A copy of the Commission's Guideline Manual has been lodged with the Clerk of this Court.

behavior that can be reliably established, even if the prisoner involved has been convicted of a lesser offense or fewer offenses as the result of a plea bargain. This practice has received judicial approval. See, *e.g.*, *Billiteri* v. *United States Board of Parole*, 541 F. 2d 938 (C.A. 2); *Bistram* v. *United States Parole Board*, 535 F. 2d 329 (C.A. 5); *Lupo* v. *Norton*, 371 F. Supp. 156 (D. Conn.); *Manos* v. *United States Board of Parole*, 399 F. Supp. 1103 (M.D. Pa). Similarly, where a prisoner has been convicted on several counts, the Commission considers the actual conduct underlying all the convictions, even if some of those convictions have been reversed on appeal, at least as long as the reversal is for reasons unrelated to guilt or innocence (*e.g.*, a court of appeals ruling that the district court improperly admitted illegally seized evidence). At least one court of appeals has endorsed this practice in connection with the Commission's evaluation of the prior conviction factor in setting a prisoner's personal characteristics rating. See *Dye* v. *United States Parole Commission*, 558 F. 2d 1376 (C.A. 10). The procedure is equally valid in determining the severity rating for a prisoner's commitment offense.

Accordingly, where an appellant challenges his conviction on certain counts but does not raise a claim that calls into question the finding of guilt, the court of appeals generally need not fear that adverse parole consequences will result from a decision to pretermit consideration of those counts in reliance on the concurrent sentence doctrine.[10] In such cases, the Parole

[10]The Eighth Circuit's decision in *Holder* thus fails to give adequate consideration to the method by which the Parole Commission actually determines a prisoner's offense severity rating. Appellant in that case argued that the district court erred in admitting co-conspirator testimony that helped establish his participation in a certain heroin sale. The court of appeals refused to apply the concurrent sentence doctrine and reviewed appellant's conviction on

Commission would consider the underlying conduct in determining offense severity, regardless of the disposition on appeal. Even if the challenged convictions were reversed, the appellant's parole treatment would not change.[11]

Here, however, petitioner raised in the court of appeals two claims of error, both of which related to his guilt or innocence on the two embezzlement counts charging him with obtaining unauthorized salary increases from union funds. He contended first that the district court improperly excluded on hearsay grounds petitioner's own testimony concerning conversations with other union officials in which they allegedly stated that the union constitution is a "living and flexible document" that should be interpreted and applied with the welfare of the membership uppermost in mind. Petitioner maintained that these statements of other union officials were offered not to prove the truth of the matter asserted, *i.e.*, not to prove that their characterization of the union constitution was accurate, but to negate petitioner's criminal intent in arranging the unauthorized salary increases. Secondly,

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the count of distributing heroin that arose from that sale. The court agreed with appellant that the coconspirator testimony should have been excluded and found the remaining evidence insufficient to sustain appellant's conviction. Accordingly, the court reversed on this count but affirmed on another count of distributing heroin. Even after this disposition, the Parole Commission will consider both sales in determining appellant's offense severity. Appellant's parole prospects would have been no worse if the court had applied the concurrent sentence doctrine.

[11]Of course, if the court of appeals can identify other adverse collateral consequences that the appellant might reasonably expect to suffer as the result of unreviewed convictions, invocation of the concurrent sentence doctrine might be improper for reasons wholly unrelated to the appellant's parole opportunities.

petitioner argued that the district court incorrectly instructed the jury on the level of fiduciary duty petitioner was required to meet in order to avoid criminal liability under 29 U.S.C. 501(c). While neither of these claims seems meritorious,[12] they do relate broadly to guilt or innocence and thus would have some bearing on the Parole Commission's view of petitioner's conduct.

In sum, the crimes involved, if considered by the Parole Commission, would clearly qualify petitioner for a higher offense severity rating than he otherwise would be likely to receive. On the other hand, reversal of the convictions on the grounds pressed by petitioner would probably cause the Parole Commission not to assign the higher rating based on the conduct underlying those convictions. Since there is a significant likelihood that the unreviewed convictions will lengthen the duration of petitioner's incarceration, the concurrent sentence doctrine should not have been applied.

In some cases, a court of appeals wishing to apply the concurrent sentence doctrine may have difficulty in ascertaining the potential effect of unreviewed convictions on the appellant's parole prospects. We believe that, because the Parole Commission guidelines are published and are reasonably specific, such instances will be relatively rare.[13] In any event, these are matters best left to be resolved by the courts of appeals in light of the kinds of cases that actually arise and the kinds of difficulties

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[12]Even if the district court should have admitted petitioner's testimony concerning the statements of other union officials, the error was probably harmless, because petitioner did testify about his understanding that the union constitution was a "living and flexible document." The alleged statements by other union officials to the same effect would have been cumulative only.

[13]The Commission has informed us that a copy of its Guideline Application Manual has been sent to each federal district and circuit judge.

actually encountered. Whatever may be the proper rule where the probability of adverse collateral consequences is more problematical, here there appears to be a significant likelihood that a reversal of the unreviewed convictions will affect the length of petitioner's incarceration. Under such circumstances at least, petitioner is entitled to review.

CONCLUSION

The supplemental petition for a writ of certiorari should be granted, and the case remanded to the court of appeals with instructions to review the pretermitted claims. In all other respects, the petition should be denied.

Respectfully submitted.

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